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JAMES H. McKENNEY,
Clerk.

In the Supreme Court

Of the United States.

In the Matter of the Application of Albert Heff, for a Writ of Habeas Corpus.

CRANE & CO., TOPEKA.

14 Orig. O.J. 1904

In the Supreme Court

Of the United States.

In the Matter of the Application of Albert Heff, for a Writ of Habeas Corpus.

Petition.

Comes now your petitioner and represents to this Honorable Court that he is illegally restrained of his liberty at the county jail in the County of Shawnee and State of Kansas, by one W. H. Mackey, United States Marshal in and for the District of Kansas.

The cause of his said illegal restraint is a commitment issued by Frank L. Brown, Clerk of the United States District Court in and for the District of Kansas, upon a judgment rendered in the foresaid Court on the 15th day of October, A. D. 1904. Copies of said commitment and judgment are hereto attached, marked "Exhibit A" and "B," respectively, and made a part hereof.

Your petitioner further represents unto your Honorable Court that such illegal restraint consists in the following, to wit:

On the 11th day of April, A. D. 1904, the Grand Jury in and for this District found and presented an indictment against your petitioner, (a copy of said indictment is here-

to attached, marked "Exhibit C," and made a part hereof,) charging him with selling intoxicating liquor in the County of Brown, in the District of Kansas, First Division, to wit: two bottles of beer, to one John Butler, an Indian, a member of the Kickapoo Tribe of Indians, and a ward of the Government, and under the charge of O. C. Edwards, Agent and Superintendent of said Tribe of Indians.

Upon the trial it was shown that John Butler was an Indian to whom an allotment of land in severalty had been made by the Government under the provision of the Act of Congress of February 8th, 1887.

It was further shown that he had received his allotment as a member of the Kickapoo Tribe of Indians; that the allotment was within the Kickapoo Reservation in the State of Kansas; that he had received the first patent referred to in the Act of Congress of February 8th, 1887; that he was residing upon said allotment, and that there is an Agent and Superintendent who was appointed by the Government and who assumes and transacts the business of the Government with and for such alloted Indians.

It is claimed by your petitioner that the Act of Congress of January 30th, 1897 (29 Stat. 506), which declares it to be a crime punishable by a fine or imprisonment to sell spiritous or malt liquors to an Indian to whom an allotment of lands has been made while the title thereto is held in trust by the Government, is unconstitutional when the sale is made to an Indian who has received an allotment of land under the provisions of the Act of Congress of February 8th, 1887, because it is provided in said Act that each and every Indian to whom such allotments have been made shall be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.

Your petitioner alleges that John Butler, having received an allotment of land in severalty and his patent

therefor under the provisions of the Act of Congress of February 8th, 1887, is no longer a ward of the Government, but a citizen of the United States and of the State of Kansas, and subject to the law, both civil and criminal, of said State.

The Hon. J. C. Pollock, Judge of the United States District Court in and for the State of Kansas, overruled this petitioner's contention upon the trial of said case, upon the decision of the Circuit Court of Appeals, Eighth Circuit, in the case of *Farrell vs. The United States,* 110 Fed. 942.

In view of said decisions, your petitioner makes his application direct to the Supreme Court of the United States.

WHEREFORE, Your petitioner prays that a Writ of Habeas Corpus may issue, and that he discharged without delay from such illegal imprisonment.

ALBERT HEFF, Petitioner.

UNITED STATES OF AMERICA, DISTRICT OF KANSAS.
State of Kansas, Shawnee County, ss.

I, Albert Heff, do solemnly swear that the facts and allegations set forth in the foregoing are true. So help me God. ALBERT HEFF.

Subscribed and sworn to before me, this 20th day of October, A. D. 1904.

[SEAL] F. L. CAMPBELL,
Deputy Clerk U. S. Dist. Court, District of Kansas, First Division.

EXHIBIT "A."

UNITED STATES OF AMERICA, DISTRICT OF KANSAS, ss.

At a term of the District Court of the United States of America for the District of Kansas, begun and held at the

City of Leavenworth, in said District, on Monday, the 10th day of October, 1904, proceedings were had, and appear of record, in words and figures following, to wit:

Saturday, Oct. 15th, 1904.

United States, No. 3735, vs. Albert Heff, indicted for selling whiskey to Indians.

It is thereupon now by the Court here considered, ordered and adjudged, that said defendant Albert Heff be imprisoned in the county jail of Shawnee County, Kansas, for a period of four (4) months, and that he make his fine unto the United States, in the sum of $200.00 and costs, and that he stand committed until said fine and costs are paid.

It is further ordered by the Court, that the Marshal deliver or cause to be delivered the body of said defendant unto the keeper of said jail within ten days from this date.

In testimony whereof, I hereunto set my hand and the seal of said court, at Topeka, in said district, this 15th day of October, A. D. 1904.

FRANK L. BROWN, Clerk.
By F. L. Campbell, Deputy.

(Seal of the District Court, U. S. District of Kansas.)

[Indorsed.]

No. 4909. Folio 277. Case No. 3735. United States *vs.* Albert Heff. Commitment. Returned and filed Oct. 17th, 1904.

FRANK L. BROWN, Clerk.
By F. L. Campbell, Deputy.

Fine, $200.00; costs, $37.24; total, $237.24.

MARSHAL'S RETURN.

Received this writ at Topeka, Kansas, October 15th, 1904, and executed the same October 15th, 1904, by committing the within named Albert Heff to the Shawnee

county jail, at Topeka, Kansas, taking the jailor's receipt therefor, as herein commanded.

W. H. MACKEY, JR., U. S. Marshal.
By F. W. Knapp, Deputy.

EXHIBIT "B."

Be it Remembered, That at a term of the District Court of the United States within and for the District of Kansas, First Division, begun and held at the City of Leavenworth, in said District, on Monday, the 10th day of October, A. D. 1904, the following proceedings were had, to wit:

Tuesday, Oct. 11, 1904.

The United States, No. 3735, vs. Albert Heff.—Selling whiskey to Indians.

Now comes as well the United States by John S. Dean, United States Attorney, as the said defendant Albert Heff in his own proper person and A. E. Crane and W. E. Archer, his attorneys, and thereupon the said defendant waives arraignment upon the indictment herein, and enters his plea of not guilty thereto; and to try matters submitted to them, come the following jury, to wit: Newell H. Smith, Eldridge Gray, P. R. Mitten, S. A. Cooper, A. P. Apassard, J. F. Naylor, Oscar O. Ayers, Obediah Williams, Frank Jolly, R. J. Wasser, A. D. Millirons and John D. Jacobs, twelve good and lawful men of the body of the First Division of the District of Kansas,—who, being duly sworn to well and truly try the matters submitted to them and a true verdict give according to the law and the evidence, the trial of said cause is proceeded with; and the jury having heard the evidence, arguments of counsel and instructions of the Court, retire in charge of their sworn bailiff to consider of their verdict, and afterwards come

into open court and through their foreman present the following verdict, to wit:

"*In the District Court of the United States for the District of Kansas. United States vs. Albert Heff, No. 3735.* —We, the jury in the above entitled cause, duly empaneled and sworn, upon our oaths, find the defendant Albert Heff guilty, as charged in the indictment.

P. R. MITTEN, Foreman."

Now comes the defendant Albert Heff, and through his counsel presents his motion for a new trial, which motion is, by the Court, set down for hearing on Saturday, Oct. 15th, 1904.

Saturday, Oct. 15, 1904.

The United States, No. 3735, vs. Albert Heff.—Selling whiskey to Indians.

This cause came on for hearing upon the defendant's motion for a new trial herein, the United States being present by John S. Dean, United States Attorney, and the defendant being present in person and by A. E. Crane and W. E. Archer, his attorneys, and the Court having heard the motion, arguments of counsel, and being duly advised in the premises, doth overrule said motion; to which ruling of the Court the defendant duly objects and excepts. Thereupon John S. Dean, United States Attorney, moves the Court for judgment and sentence against the above named defendant. Thereupon the Court asked the defendant if he had any good reason to offer why the sentence and judgment of the Court should not now be pronounced against him, and no good reason being offered,

It is thereupon now by the Court considered, ordered and adjudged, that the said defendant, Albert Heff, be imprisoned in the county jail of Shawnee County, Kansas, for a period of four (4) months, and that he pay a fine unto

the United States in the sum of two hundred ($200.00) dollars, and that he pay the costs of this prosecution; and that he further stand committed until said fine and costs are paid.

It is further ordered by the Court that the Marshal deliver or cause to be delivered the body of said defendant unto the keeper of said jail within ten days from this date.

EXHIBIT "C."

[Form No. 668.]

THE UNITED STATES OF AMERICA, DISTRICT OF KANSAS, ss.

In the District Court of the said United States, in and for the First Division of said District, April Term, 1904.

The United States of America vs. Albert Heff, (whose more full Christian name is unknown.) Indictment for violation of 29th Stat., pp. 506, Revised Statutes of the United States.

At the Term of the District Court of the United States of America, in and for the First Division of said District of Kansas, begun and held at Topeka, in the First Division of said District, on the 11th day of April, in the year of our Lord one thousand nine hundred and four, the Grand Jurors of the United States of America, duly impaneled, sworn, and charged to inquire of offenses committed within the First Division of the District of Kansas, upon their oaths do find and present, that Albert Heff, (whose more full Christian name is to the Grand Jurors aforesaid unknown,) late of the First Division of the District of Kansas aforesaid, on or about the 20th day of March, in the year of our Lord one thousand nine hundred and four, at the First Division of the District of Kansas aforesaid, and within the jurisdiction of this Court, did then

and there unlawfully sell, give away and dispose of certain malt, spiritous and vinous liquors, at the town of Horton, in the County of Brown, in the State and District of Kansas, to John Butler, to wit, two quarts of beer, more or less, and he, the said John Butler, being then and there an Indian, a member of the Kickapoo Tribe of Indians and a ward of the Government, under the charge of O. C. Edwards, an Indian Superintendent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

EDWIN D. MCKEEVER,
Assistant United States Attorney.

[Indorsed.]

No. 3735. United States District Court, First Division. The United States vs. Albert Heff. Selling whiskey to Indians. A true bill.

A. A. WHEELER, *Foreman.*

WITNESSES: O. C. Edwards, Horton, Kansas. Dan Kah-Ke-Kah, Horton, Kansas. John Butler, Horton, Kansas.

Filed April 18, 1904.

FRANK L. BROWN, *Clerk.*

CERTIFICATE.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

UNITED STATES OF AMERICA, DISTRICT OF KANSAS, *ss.*

I, Frank L. Brown, Clerk of the District Court of the United States of America for the District of Kansas, do

hereby certify the foregoing to be a true, full and perfect copy of Indictment, Judgment and Sentence, and of the Commitment issued, with all endorsements thereon, in the case of The United States vs. Albert Heff, No. 3735, as the same appear of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Topeka, in said District of Kansas, this 20th day of October, A. D. 1904.

Frank L. Brown, Clerk.

[seal] By F. L. Campbell, Deputy Clerk.

In the Supreme Court of the United States.

BRIEF AND ARGUMENT.

I.

THE court has jurisdiction to grant a writ of habeas corpus, herein and should do so.

Ex Parte Mayfield, 141 U. S. 107.

II.

The petitioner was charged under the provision of the Act of Congress of January 30, 1897, (29 Stat. 506), with selling beer to John Butler, an Indian, a ward of the Government and under the charge of a Superintendent; and it was shown that John Butler was an Indian who had received an allotment of land in severalty under the Act of Congress of February 8th, 1887. It is not contended that the Government has no jurisdiction of a tribal Indian or the power to punish a person who sells such an Indian intoxicating liquor. This Honorable Court has defined the status of an Indian that is subject to the jurisdiction and

control of Congress. In the case of *The United States v. Hagama,* 118 U. S. 375, this court says:

"It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the Nation. They are communities dependent upon the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and received from them no protection."

III.

When an Indian has received an allotment of land in severalty and his patent therefor under the Act of Congress of February 8, 1887, he is a citizen of the United States and the State in which he resides, and is subject to its laws, both civil and criminal.

In re Now-ge-zhuck, 76 Pac. 877.
State v. Denoyer, 72 N. W. 1014.
State v. Norris, 55 N. W. 1086.
Keokuk v. Ulam, 38 Pac. 1080.
Wa-la-note-tke-tynin v. Carter, 53 Pac. 1006.
U. S. v. Rickert, 106 Fed. 1.

IV.

If an Indian to whom an allotment of land in severalty has been made under the provisions of the Act of Congress of February 8th, 1887, is a citizen of the United States and the State in which he resides and is subject to the laws of such State, then the Government cannot legislate concerning him. The State and the Government cannot

legislate upon the same subject. There is no such thing as a divided jurisdiction. In the case of *The U. S. v. Ward,* 1 Kans. 601, it is said:

"It would seem that the right to enforce her criminal laws, in any part of the soil which became a part of the State of Kansas by that Act, is a necessary incident to her becoming one of the States of the Union on an equal footing in all respects with the other. This right is exclusive; it is not a right to be exercised jointly or concurrently with the Federal Government. It needs no argument to prove that if this right, in any given locality, rests with the State of Kansas, it cannot belong to the Federal Government."

In the case of *The State v. Campbell,* 55 N. W. 553, 555, it is said, in speaking of the Indians, to wit:

"And if they are thus under the control of Congress, that control must be exclusive, for, as suggested in the case of *The Kansas Indians,* 5 Wallace, 737, 'from necessity there can be no divided authority.' It would never do to have both the United States and the State legislating on the same subject."

It is plain from the foregoing authorities that if the State of Kansas has jurisdiction of the person of the Indians, and can legislate concerning them, that jurisdiction must be exclusive.

ALBERT HEFF.

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JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

In The Matter of The Application of Albert Heff For a Writ of Habeas Corpus.

14 Orig.

Brief of Petitioner.

A. E. CRANE.
Attorney for Petitioner.

JACKSON COUNTY WORLD, CIRCLEVILLE, KAN.

IN THE SUPREME COURT

—OF THE—

UNITED STATES.

In The Matter of The Application of Albert Heff For a Writ of Habeas Corpus.

Brief of Petitioner.

STATEMENT OF FACTS.

It is admitted that Albert Heff, your petitioner, was convicted in the United States District Court of Kansas, of selling intoxicating liquor to John Butler, an Indian, who at the time of said sale had received an allotment of land in severalty on the Kickapoo Indian Reservation in Brown county, Kansas, under Act of Congress of February 8, 1887.

It is further admitted that John Butler was born within the territorial limits of the United States and at

the time of the said sale was residing on his allotment in Brown county, Kansas, and had been residing on said allotment for about ten years.

BRIEF OF ARGUMENT.

It is claimed by your petitioner that John Butler having received an allotment of land in severalty under the Act of Congress of February 8, 1887, was not a ward of the government, but a citizen of the United States and of the state of Kansas.

The Act of Congress of February 8, 1887, makes all Indians to whom allotments shall have been made under the provisions of the Act, citizens of the United States and entitled to all the rights, privileges and immunities of such citizens. It further provides that upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws both civil and criminal, of the state or territory in which they may reside.

Section 6 of the Act of Congress of February 8, 1887, reads as follows, to-wit:

"SECTION 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes

of Indians to whom allotments have been made shall have the benefit and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.

"And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The aforesaid section has been construed by the Supreme Courts of several of the states, and in each and every instance the Courts have held that Indians to whom allotments have been made in severalty and upon which the preliminary patents have been issued, are citizens of the United States. In the case of the State vs. Denoyer, 72. N. W. Rep. 1015, it is said:

"Such Indians and persons of Indian descent, so residing upon lands alloted to them in severalty, and upon which the preliminary patents had been issued, are citi-

zens of the United States, and qualified electors of this state."

In State vs. Norris, 55 N. W. Rep. 1086, it is said:

"By the provisions of said act, all Indians born within the territorial limits of the United States, to whom allotments of land in severalty have been made under the provisions of said law, or other law or treaty, and all Indians, born as aforesaid, who have voluntarily taken up their residence in the United States, separate and apart from any tribe of Indians therein, and adopted the habits of civilized life, are made citizens of the United States, and such Indians residing in this state are citizens thereof.

"The actual issuance or receipt by an Indian of a patent for lands alloted to him under the act is not necessary to constitute him a citizen of the United States. When he has accepted the land alloted, taken possession thereof, and otherwise complied with the law, he becomes entitled to his patent, and his citizenship attaches."

In Wa-La-Note-Tke-Tynin vs. Carter, 53 Pac. Rep. 106, it is said:

"It seems clear to us, under the provisions of this section, that the Indians who have availed themselves of the provisions of said act, and complied with the exigencies thereof, have the same standing in the courts of the state as any other citizen of the United States."

In United States vs. Rickert, 106 Fed. Rep. 5, it is said (after quoting Section 6 of the aforesaid act,) that,

"It appears from the legislation of congress that the Indians mentioned in the bill of complaint are citizens of the United States and of the state of South Dakota, and

are entitled to the benefits of and are subject to the laws, both civil and criminal, of the state of South Dakota. By Section 1, Article 7, of the constitution of the state of South Dakota they are qualified electors of the state of South Dakota. They have all the rights and privileges of any citizen of the United States residing within this state. They have a voice in the making of the laws of the state. They are shielded and protected in their persons and property by the laws of the state."

In the case of In Re Now-Ge-Zhuck, 76 Pac. Rep. 877, it is said:

"The act of Congress of February 8, 1887, C. 119, 24 Stat. 388, providing for the alloting of lands constituting an Indian reservation to the Indians in severalty, and the issuing of patents to the allottees therefor, and further providing that, upon the completion of said allotments and the issuing of patents to each of the allottees constituting the tribe, each allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state in which he may reside, upon the completion of the allotments and the issuing of patents to each of the allottees, confers jurisdiction on the state courts to try and punish an allottee for any violation of the laws of the state, though the offense committed be one against the person or property of an Indian or other person within the limits of an Indian reservation."

In Boyd vs. The State of Nebraska, 143 U. S. 162, in the opinion it is said:

"The Act of Congress approved February 8, 1887 (24 Stat. at L. 388), was much broader, and by its terms made every Indian situated as therein referred to, a citizen of the United States."

In Draper vs. United States, 164 U. S. 240, 246, in the opinion it is said:

"From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the state to frustrate the limitations imposed by the laws of the United States upon the title of land once in an Indian reservation, but which has become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the state."

THE RIGHTS OF CITIZENS.

A citizen is one who owes the government allegiance, service and money by way of taxation, and to whom the government in turn grants and guarantees liberty of person and conscience, the right of acquiring and possessing property, of marriage and the social relations of suit and defense, and security in person, estate and reputation.

In the case of the United States vs. Cruik-Shank, 92 U. S. 542, it is said:

"Citizens are members of the political body to which they belong; they are the people who compose the community, and who, in their associative capacity, have es-

tablished or submitted themselves to the dominion of government for the promotion of their general welfare and the protection of their individual as well as their collective rights."

In Dred Scott vs. Sanford, 19 How. (U. S.) 476, it is said:

"The words 'people of the United States' and 'citizens' are synonmous terms and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty."

In Lyons vs. Cunningham, 4 Pac. Rep. 938, it is said:

"It is true that a citizen, in the full acceptation of that term may be said to be a member of the civil state, entitled to all its privileges."

In Blank vs. Pausch, 113 Ill. 60, it is said:

"A citizen, in the popular and appropriate sense of the term, is one who by birth, naturalizations, or otherwise, is a member of an independent political society, called a state, kingdom, or an empire, and whom as such is subject to its laws and entitled to its protection in all his rights incident to that relation."

THE UNITED STATES AND THE STATE OF KANSAS CANNOT LEGISLATE ON THE SAME SUBJECT.

It is plain from the foregoing authorities and the Act of Congress of February 8, 1887, that John Butler at the time of the sale of intoxicating liquor to him was a citizen of the state of Kansas and subject to its laws both civil and criminal. If he were a citizen of the state of Kansas, he would owe allegiance to the state and the state would be bound to protect him in his rights as such citizen, and in so doing the state would have the right to legislate concerning the sale of intoxicating liquor to him.

People vs. Bray, 38 Pac. Rep. 731.

If the state has the right to legislate concerning such matters, it cannot belong to the federal government.

In the United States vs. Ward, 1 Kan. 604, it is said:

"It would seem that the right to enforce her criminal laws, in any part of the soil which became a part of the state of Kansas by that act, is a necessary incident to her becoming one of the states of the Union, on an equal footing in all respects with the others. This right is exclusive. It is not a right to be exercised jointly or concurrently with the Federal government. It needs no argument to prove that if this is right, in any given locality, rests with the state of Kansas, it cannot belong to the Federal government."

In State vs. Campbell, 55 N. W. Rep. 553, 555, it is said:

"And if they are thus under the control of Congress,

that control must be exclusive for, as suggested in the case of Kansas Indians, 5 Wall. 737, 'From necessity there can be no divided authority.' It would never do to have both the United States and the State legislating on the same subject."

In the case of Kansas Indians, 5 Wall. 737, it is said:

"If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity, there can be no divided authority."

CITIZENSHIP IS NOT AFFECTFD BY TRIBAL RELATIONS.

A white man being a citizen of a state may, by adoption, become a member of a tribe of Indians, but his citizenship is not affected thereby, and he is still amenable, in every respect, to the laws of such state, both civil and criminal. His adoption into one of these tribes has the effect to bestow on him the privileges and immunities of its members, and subjects him to the laws and usages of the tribe, but it has no greater effect. An Indian who has become a citizen, under an act of Congress, occupies

the same relation to the tribe and the state, as a citizen who has been adopted into one of these tribes.

It will not be contended by the government that a citizen who has been adopted into an Indian tribe is a subject of Federal authority.

If a citizen who has been adopted into a tribe, is not a subject of Federal authority, why should an Indian who is a citizen, be subject to such authority? The answer is that there is no semi-condition of citizenship, a diminished or an abridged right thereof, but that citizenship means and is the same to all citizens of a commonwealth alike, and is as full and complete as the constitution and laws of such state has provided.

In French vs. French, 52 S. W. Rep. 517, it is said:

"A citizen of the United States, who becomes a member of an Indian tribe by adoption, does not lose his citizenship."

Judge Sanborn in the case of Raymond vs. Raymond, reported in 28 C. C. A. 38; 83 Fed. 723, says:

"A citizen of the United States, who becomes a member of one of the civilized Indian tribes by adoption, does not thereby denationalize himself, and does not become an Indian. He remains a citizen of the United States. He still owes support and allegiance to the land of his birth, and is still entitled to her protection against the assaults of every foreign prince, potentate, or power."

In United States vs. Rogers, 4 How. 567, it is said:

"It results from these principles, that a plea, set up by a white man, alleging that he had been adopted by an

Indian tribe, and was not subject to the jurisdiction of the Circuit court of the United States, is not valid."

WHEN AN INDIAN BECOMES A CITIZEN OF THE UNITED STATES, CONGRESS CANNOT REGULATE COMMERCE.

When an Indian becomes a citizen of the United States, he also becomes a citizen of the state wherein he resides.

Gassies vs. Ballon, 6 Peters (U. S.) 761.

When an Indian becomes a citizen of a state, he is subject to its laws both civil and criminal. Congress only has power to regulate commerce of a tribe of Indians who maintain their tribal relations and while they are in a condition to determine for themselves with whom they will have commerce, or are in a condition to have Congress determine it for them. It would be absurd to say that a tribe of Indians who have become citizens of the United States are wards of the government.

This Honorable Court has defined the status of an Indian that is subject to the jurisdiction and control of Congress. In the case of the United States vs. Kagama, 118. U. S. 375, it is said:

"It seems to us that this is within the competency of Congess. These Indian tribes are the wards of the Nation. They are communities dependent upon the

United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection." Again in said case the Court said: "With the Indians themselves these relations are equally difficult to define. They were and always have been, regarded as having a semi-independent position when they preserved their tribal relation; not as States, not as Nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."

Indians who have received allotments of land in severalty, are not in a condition of pupilage nor are they dependent upon the Nation for their political rights, but they are citizens and owe allegiance to the States and receive from them protection.

Congress has no power to legislate concerning such an Indian.

The Indians themselves, when off their reservations, or when they have severed their tribal relations or become citizens of the United States are subject to the laws of the State or Territory in which they reside.

In State vs. Williams, 43 Pac. Rep. 15, it is said:

"An Indian who has severed his tribal relations may be prosecuted in the courts of the state, whether the crime was committed within or without the reservation."

In the case of the People vs. Ketchem, 15 Pac. Rep. 353, it is held that an Indian, who is not a member of a

tribe of Indians, is subject to the laws of the state. To the same effect is the case of State vs. Howard, 74 Pac. Rep. 382.

In the case of State vs. Newell, 24 Atl. 943, it is said:

"While they have a partial organization for tenure of property and local affairs, they have no separate political organization, and are subject as individuals to all the laws of the state." And again in the opinion it is said: "Though these Indians are still spoken of as the 'Passamaquoddy Tribe' and perhaps consider themselves a tribe, they have for many years been without a tribal organization in any political sense. They cannot make war or peace; cannot make treaties; cannot make laws; cannot punish crime; cannot administer even civil justice among themselves. Their political and civil rights can be enforced only in the courts of the state. They are as completely subject to the state as any other inhabitant can be."

See Stevens vs. Thatcher, 39 Atl. 282.

In United States vs. Hershman, 53 Fed. 543, it is said:

"I have repeatedly decided that it is not a crime under this statute to dispose of spirituous liquor to British Columbia Indians, or Indians upon whom the rights, privileges, and immunities of citizenship have been conferred by the laws of the United States; and it is my opinion now that the statute under consideration is not applicable to any case of selling or disposing of liquor to an Indian not at the time subject to the general authority and supervision given by the laws of the United States to the officers of Indian affairs."

In the case of In Re Now-Ge-Zhuck, 76 Pac. 877, it is said:

"If allotment of lands in severalty failed to dissolve the tribal relations, it constituted at least a step in that direction. The allotment also constituted the allottee a citizen of the state or territory in which he may reside. It is not to be presumed that the rights of citizenship would be conferred upon the allottee for his benefit, and he be for a period of twenty-five years exempted from the operation of the laws of the state of which he became a citizen, and, aside from those crimes specifically mentioned in the act of March 3, 1885, be restrained only by a code of laws based upon the primitive ideas and standards of a tribal council. An Indian upon whom has been conferred citizenship, and who enjoys the protection of the laws of the state, should be punished for a transgression of them. This we are to presume Congress contemplated. It being shown by the agreed facts that the petitioner was an allottee to whom a patent had been issued, and further shown that the allotments had been made and completed as provided by the act of February 8, 1887, the laws of the state were operative, and the state had jurisdiction to arrest and punish petitioner for the offense by him committed."

The relation of the Indian Tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character. Following the policy of the European Governments in the discovery of America towards the Indians who were found here, the colonies before the Revolution, and the

States and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. These Indian governments were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white; and their freedom was constantly acknowledged until about March 3, 1871. These Indian tribes were ruled by a treaty-making system of government for about one hundred years. The tribes were allowed to punish the members thereof for any offense committed against the tribal laws. Congress determined upon a new departure—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in section 2079 of the Revised Statutes:

"No Indian Nation or Tribe, within the territory of the United States shall be acknowledged, or recognized as an independent Nation, Tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian Nation or Tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

Congress thereafter on March 3, 1885, enacted: "That immediately upon and after the date of the passage of this Act all Indians committing against the person or property of another Indian or other person any of

the following crimes; namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny, * * * within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." This Court in the case of The United States vs. Kagama, 118 U. S. 375, held the aforesaid Act of Congress to be valid. This was the first enactment of Congress wherein jurisdiction was conferred upon the Federal Courts to try and punish a tribal Indian for a crime committed on an Indian reservation by one Indian upon the person or property of another Indian. The State of Kansas has had jurisdiction over white persons committing offenses upon the Kickapoo Indian reservation in Brown county, Kansas, ever since its admission into the Union.

The jurisdiction of the Federal government over these Indian tribes rests, not upon the ownership of and sovereignty over the country in which they reside, but upon the fact that, as wards of the general government, they are the subjects of Federal authority within the state.

State vs. Campbell, 55 N. W. Rep. 553, 555.

United States vs. Kagama, 118 U. S. 375.

The only jurisdiction the Federal Court had over the Indians at the time the Act of Congress of February 8,

1887, became a law, was based upon the fact that the Indians were wards of the government, and by that Act the jurisdiction of the person of the Indian was surrendered to the state upon his having received an allotment of land under said Act of Congress. By the Act of Congress of February 8, 1887, the jurisdiction of the person of an allotted Indian was surrendered to the state wherein he resided. There is nothing reserved by the provisions of the aforesaid Act of Congress but the title to the land.

The Act of Congress of January 30, 1897, (29 Stat. 506), attempts to make it a crime for a person to sell intoxicating liquor to an Indian who has received his allotment of land in severalty while the title to the same shall be held in trust by the government. The aforesaid provision of the Act of Congress of January 30, 1897, is unconstitutional and void. Congress has no power to regulate commerce between the citizens of a state even if one is an Indian.

If John Butler became a citizen of the State of Kansas when he received his allotment of land in severalty, he at that minute became subject to the laws of the state of Kansas.

If he became subject to the laws of the State of Kansas, then the United States lost all jurisdiction over him. About the only jurisdiction that is claimed over the Indian by the Federal government is the right to legislate concerning the Indian's appetite for strong drink.

FARRELL VS. UNITED STATES.

In the case of Farrell vs. United States, 110 Fed. 942, it is admitted that an Indian to whom an allotment has been made is a citizen of the United States and of the state of South Dakota. In the opinion of said case p. 942, it is said:

"Under these constitutions and statutes the concession must be made that this Indian was a citizen of the United States and of the state of South Dakota in 1897," again on p. 950, it is said: "These Indians are citizens, but they were originally wards."

If Glode La Framboise was a citizen of the United States and of the state of South Dakota, then John Butler was a citizen of the United States and of the state of Kansas when the sale of intoxicating liquor was made to him.

It is claimed in the case of Farrell vs. United States, that the Nation has the same right and authority to retain control over the commerce with these Indians that it had to retain the title to the lands in trust for them for twenty-five years longer. This I do not admit. The United States could not turn over the jurisdiction of the person of the Indian to the state of Kansas, both civil and criminal, and retain jurisdiction over his appetite for strong drink.

When John Butler became a citizen of the United States and of the state of Kansas, at that time, he became subject to its laws both civil and criminal.

To sustain the reasons given in the Farrell case, it would require this court to hold that the state could legislate concerning all crimes committed by Indians and the Federal government could legislate concerning the Indian's appetite for intoxicating liquor.

But the question, whether the United States could confer the rights of citizenship upon an Indian, a ward of the Nation, and reserve the right to prohibit the sale of intoxicating liquor to such person, is not a question in this case as there is no such provision in the Act of Congress of Feb. 8, 1887.

The Act of Congress of February 8, 1887, makes all Indians to whom allotment shall have been made under the provisions of said act, citizens without any qualification and there is nothing reserved by said act except that the United States is to hold the title of the land thus allotted in trust for a period of twenty-five years.

John Butler was made the same kind of a citizen by said Act of Congress as all other citizens of the state of Kansas are without any qualification whatever.

The Farrell case holds that it is necessary for the Federal government to retain this right for the protection of the Indian, and one would infer from such holding that a state could and would not protect these Indians if they became subject to its jurisdiction.

In this state, we have a law prohibiting the sale of intoxicating liquor, to be used as a beverage, to any person and also have a law that prohibits the sale of intoxicating liquor to an Indian. As a citizen of this state, I

believe we can and will protect the Indians from the baleful effects of intoxicating liquor as well as the Federal government is doing at this time.

It is not claimed by the writer of this brief that it is one of the rights of citizenship to be permitted to drink intoxicating liquor and because of that fact the Act of Congress of January 30, 1897, (29 Stat. 506) is unconstitutional. It is claimed that John Butler, when he received his allotment under the Act of Congress of February 8, 1887, became a citizen of the United States and of the state of Kansas without any limitation upon such citizenship and as such citizen became subject to the laws of the state of Kansas and entitled to the protection given by the laws of said state. If the aforesaid claim is true John Butler is not a subject of Federal legislation, and the Act of Congress of January 30, 1897, is unconstitutional and void. The state of Kansas has the right to regulate the conduct of the citizens of the state and in so doing has the right to prohibit the sale of intoxicating liquor to an Indian.

In State vs. Wise, 72 N. W. 843, it is said:

"It is unnecessary here to enter into any discussion of the question what privileges and immunities are guaranteed by the Federal constitution; for nothing is better settled than that, whatever they are, they are all subject to the proper exercise of the police power of the several states."

In State vs. Lee, 38 S. W. Rep. 583, it is said:

"It is not only within the power of the state to do

so, but it is its duty to protect its citizens and advance the safety and prosperity of its people."

In Breechbill vs. Randall, 1 N. E. Rep. 362, it is said:

"The power to make police regulations for the protection of its citizens against fraud and imposition is not taken from the states by the federal constitution, or by any national statute. It has, indeed been authoritively settled that the national legislature cannot exercise police power for the protection of the inhabitants of a state. This is a domestic matter, to be governed and regulated by state laws."

In New vs. Walker, 108 Ind. 365, 9 N. E. Rep. 386, it is said:

"It has been directly decided by the Supreme Court of the United States, as well as by this court, that the national congress cannot make police regulations for the protection of the people of the state. * * * As the federal legislature cannot enact police regulations which will yield the citizens of the state just protection, it must be that the state legislature may enact such regulations, or the citizens be left without protection."

See W. U. Tel. Co. vs. Pendleton, 95 Ind. 12.

In Hockett vs. State, 5 N. E. Rep. 181, it is said:

"It is a power inherent in every sovereignty, and is, in the broadest sense, nothing more than the power of a state to govern men and things within the limits of its own dominion."

In Board of Excise vs. Barrie, 34 N. Y. 666, it is said:

"A state is not sovereign, without the power to regulate all its internal commerce as well as police."

In Cooley on Const. Lim., Par. 572, it is said:

"The police of the state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

In United States vs. DeWitt, 9 Wall. (U. S.) 41, it is said:

"Congress has no power, under the Constitution, to prohibit trade within the limits of a state."

In License Tax Cases, 5 Wall. 462, 475, it is said:

"We now come to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued for the defendant in error that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the state in which the defendants resided; that the internal trade of a state is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under Acts of Congress, must therefore be absolutely null and void, and consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed."

In Slaughter House Cases, 16 Wall. (U. S.) 36, in the opinion it is said:

"This definition of the privileges and immunities of citizens of the States is adopted in the main by this court in the recent case of Ward vs. Md., 12 Wall., 430 (79 U. S., XX., 452), while it declines to undertake an authoritative definition beyond what was necessary to that decision. The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington, those rights which are fundamental. Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the state governments were created to establish and secure."

In the case of Farrell vs. United States, 110 Fed. 951, it is said:

"The question which has been discussed is a serious one, and it is not free from doubt. It has received investigation, study, and deliberation."

In the last mentioned case, the court seems to have had some doubt as to the correctness of their decision. I think that the court in the case of Farrell vs. United States, must have overlooked what are the rights of citizens of a state and the rights of a state. No one can, in the correct sense of the term, be a citizen of a state, who is not entitled, upon the terms prescribed by the institutions of the state, to all the rights and privileges conferred by those institutions upon the highest class of soci-

ety. A citizen is one who, by birth, naturalization, or otherwise, is a member of an independent political society, and as such is subject to its laws and entitled to its protection in the enjoyment of civil or private rights.

A state has, as a general rule, absolute and exclusive jurisdiction over persons and things within its territory.

By the Act of Congress of January 30, 1897, (29 Stat. 506), the sale of intoxicating liquor is prohibited, "to any Indian to whom an allotment of land has been made, while the title to the same is held in trust by the government, or to any Indian a ward of the government under the charge of an Indian superintendent or agent."

It is plain from the foregoing provisions of said act that Congress intended a distinction between Indians who had received allotments, and wards of the government under the charge of an Indian superintendent or agent.

It would require entirely different proof to sustain an indictment charging a sale of intoxicating liquor to an Indian to whom an allotment had been made while the title to the same was held in trust by the government, and an indictment charging the sale of intoxicating liquor to an Indian, a ward of the government under the charge of an Indian superintendent or agent. Under the first indictment, the government would be required to prove a sale of intoxicating liquor to an Indian to whom an allotment had been made, and that the title to the same was held in trust by the government. This evidence would sustain a conviction under such indictment. No proof would be required that such Indian belonged to

any tribe of Indians or that such Indian was under the charge of an Indian superintendent or agent It seems that under such an indictment, the proof that the Indian's land is held in trust by the United States is sufficient to sustain a conviction. The fact that the title to land is held in trust for another does not make the party for whom the land is held a ward of such trustee. A ward is one who is under the care and control of a guardian.

Under the Act of Congress of February 8, 1887, all Indians to whom allotments have been made in severalty under the provisions of said Act are citizens of the United States and subject to the laws, both civil and criminal, of the state wherein they reside. These provisions are not consistent with the claim of the government that they are wards of the Nation. Under said Act, the government is simply a trustee for the lands and monies of said Indians. The government has no control whatever of the person of an alloted Indian other than it has of any other citizen of the state. The state has the right to legislate concerning such an Indian and it is its duty to protect him in all his rights as a citizen. If this be true, John Butler was not a ward of the government, but a citizen of Kansas, and the conviction cannot be sustained. Under the second indictment, it would be necessary to prove a sale of intoxicating liquor to an Indian, a ward of the government, under the charge of an Indian superintendent or agent. Under such indictment to sustain a conviction, it would be necessary to prove

that the Indian to whom the sale of liquor was made was a tribal Indian, and in a state of pupilage; dependent upon the United States; dependent largely for his daily food; dependent for his political rights. He must owe no allegience to the state and receive from it no protection. Such an Indian is subject to the jurisdiction and control of Congress. John Butler is not such an Indian. He is not dependent upon the United States for his political rights nor is he in a state of pupilage but a citizen of the United States and of the state of Kansas. He owes allegience to the state of Kansas and receives from it protection.

(In Re Now-Ge-Zhuck, 76 Pac. 877.) There is no court that holds that a citizen Indian, who has severed his tribal relations, is subuject to the control of Congress.

In the 16 Am. and Eng. Enc. of Law 222, 223, 2nd Ed., it is said:

"The Indians themselves, when off their reservations, or when they have severed their tribal relations or become citizens of the United States are subject to the laws of the state or territory in which they reside."

If an Indian to whom an allotment of land in severalty has been made under the provisions of the Act of Congress of February 8, 1887, is a citizen of the United States and the state in which he resides and is subject to the laws of such state, then, the government cannot legislate concerning him.

The State and the Government cannot legislate upon

the same subject. There is no such thing as a divided jurisction. It would never do to have the United States and the state legislating on the same subject.

If the state of Kansas has jurisdiction of the person of John Butler, that jurisdiction must be exclusive. It would not do for this Court to say that the state of Kansas has exclusive jurisdiction of the person of John Butler and that the Federal Government had exclusive jurisdiction to legislate concerning his appetite for strong drink. To sustain the contention of the Government it would be necessary for this Court to so hold. I believe John Butler's appetite for intoxicating liquor cannot be a ward of the Government, and under the exclusive control and protection of Congress, and the person of said Indian be a citizen of the United States and of the state of Kansas and under the exclusive jurisdiction of said state.

It seems that the foregoing has been sustained by the courts.

The Supreme Court of the state of Kansas in the case of In Re Now-Ge-Zhuck, 76 Pac. Rep. 877, holds that the state of Kansas has jurisdiction to try and punish an allottee for any violation of the laws of the state, though the offense committed be one against the person or property of an Indian or other person within the limits of an Indian reservation.

The Circuit Court of Appeals in the case of Farrell vs. United States, 110 Fed. 942, holds that under its power to regulate commerce with the Indian tribes

(Const. Art. I. § 8), Congress had authority to pass the Act of January 30, 1897, (29 Stat. 506), which declares it to be a crime punishable by fine and imprisonment to sell spirituous liquors to any Indian to whom an allotment of lands has been made while the title thereto is held in trust by the government.

Either the Supreme Court of Kansas or the Circuit Court is wrong. One of these courts is without jurisdiction. Both cannot be right. There can be no divided jurisdiction.

I believe that the decision in Farrell vs. United States is the one that is contrary to law. In that case, the court holds that an Indian who has received an allotment under the Act of February 8, 1887, is subject to the laws both civil and criminal of the state wherein he resides, and that such an Indian is a citizen of the United States. For the foregoing reasons, that portion of the Act of Congress of January 30, 1897, which prohibits the sale of intoxicating liquor to an Indian to whom an allotment has been made while the title thereto is held in trust by the government, is unconstitutional and void.

REPLY TO BRIEF OF RESPONDENT.

It is admitted that the Kickapoo tribe of Indians prior to their taking allotments of land in severalty under the Act of Congress of February 8, 1887, were tribal Indians and wards of the government.

Congress had the power at that time to regulate commerce with such tribe or the members thereof.

WHAT EFFECT DID THE ACT OF CONGESS OF FEBRUARY 8, 1887, HAVE UPON THE TRIBAL ORGANIZATION OF THE KICKAPOOS?

It is admitted by the respondent that all of the Kickapoo tribe of Indians had taken allotments of land in severalty, under the provision of said act prior to February 1895. (Brief of Res. pp. 9, 10.)

The Act of Congress of February 8, 1887, was intended to extend the laws of the United States and the territory over various tribes of Indians

Every court which has been called upon to construe said Act of Congress, holds, that allottees under said Act are citizens of the United States and of the state wherein they reside and are subject to the laws, both civil and criminal, of said state.

The respondent admits that Indians to whom allotments have been made are citizens of the United States and subject to the laws of the state wherein they reside. (Brief of Res. pp. 19, 20).

The Act of Congress of February 8, 1887, simply provides that all Indians to whom allotment shall have

been made under the provisions of said act are citizens of the United States and of the state wherein they reside and makes each allottee subject to the laws, both civil and criminal, of said state and further provides that the title to the land shall be held in trust by the government for a period of twenty-five years or longer and that certain monies will be held by the government for the use and benefit of the tribe or the members thereof.

The government by said Act relinquished all control over the person of the Indian and reserved only the rights of a trustee of the allottee's land and monies.

Section 6, of said Act provides that each Indian to whom an allotment shall have been made shall be a citizen of the United States, "without in any manner impairing or otherwise affecting the rights of any such Indian to tribal or other property."

It is plain to be seen that Congress by such provision intended to do away with the tribal relations of allotted Indians except in so far as it was necessary to dispose of any monies or land still held by the government in trust for said Indians. The effect of said provision is that the government will consider such allottees members of said tribe of Indians for the purpose of settling up their affairs and disposing of the property held in trust by the government and for no other purpose. Indians who have received allotments under said Act, are no longer the wards of the Nation but citizens of the United States. Where there is a ward, there must be a guardian. A guardian is one who has the right to con-

trol the person of his ward. In effect by the Act of Congress of February 8, 1887, the rights of majority were conferred upon the allottees. By said Act, Congress lost all jurisdiction of the person of an allottee, it only reserved to the government the rights of a trustee. The Kickapoo Indians have surely severed their tribal relations.

In the case of the United States vs. Rickert, 106 Fed. 1, 6, it is said:

"These Indians have severed their tribal relations, and adopted the ways of civilized life, and have become full citizens of the United States, and owners of property in the state of South Dakota."

Again in the opinion of said case on page 6, it is said:

"The Indians mentioned in the bill occupy about the same relation with reference to the United States and the state of South Dakota as do settlers upon the public lands of the United States, who have entered and paid for their land, and done everything that is required to be done by the laws of the United States to give them title to the land upon which they reside; the naked legal title, simply, remaining in the United States."

It is plain that Congress by said Act, intended to confer upon allottees the rights and duties of citizenship and at the same time secure to them a home for at least twenty-five years. The fact, that the Act provides that the title to land shall be held in trust by the govenment, in nowise limits the allottees citizenship, nor does it in the slightest degree detract from the dignity or value of citizenship.

In the case of Beck vs. Flournoy Live Stock and Real Estate Co., 65 Fed. 35, it is said:

"The only argument that has been advanced to sustain the validity of the leases in question is founded on Section 6 of the Act of February 8, 1887, heretofore quoted. It is suggested, as we understand, that because Congress conferred the right of citizenship upon all Indians to whom allotments of land might be made, and upon every Indian who should take up a residence separate and apart from his tribe, and adopt the habits of civilized life, the power to sell, lease, and otherwise dispose of allotted lands was also conferred as a necessary incident of citizenship. It is urged, as we understand, that Congress could not make these Indians citizens of the United States without at the same time giving to them the unrestricted power to sell, use, and control all property whatsoever in which they chanced to have an interest. This argument appears to us to be untenable. We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges, and immunities of citizens, while it retained, for the time being, the title to certain lands, in trust for their benefit, and withheld from them for a certain period the power to sell, lease, or otherwise dispose of their interest in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real property, and to withhold from the donee, for a season, the power to sell or otherwise dispose of it. And we can conceive of no sufficient reason why the United States, in the exercise of its sovereign power,

should be denied the right to impose similar limitations especially when it is dealing with a dependent race like the Indians, who have always been regarded as the wards of the government. Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived, for the time being, of the right to alienate it. It does not follow, therefore, that the power of these Indians to deal with land which was held by the government in trust for their benefit was sensibly enlarged, or that the restriction against alienation found in the fifth section of the Act of February 8, 1887, was removed, because, in the sixth section of the same Act, Congress saw fit to declare that when land had been allotted to an Indian, or he had separated from his tribe, and adopted the habits of civilized life, he should be entitled to all the 'rights, privileges, and immunities' of a citizen. The two sections of this Act are by no means inconsistent with each other. The clause imposing a limitation upon the power of alienation is not in conflict with the subsequent clause conferring the boon of citizenship. Both provisions may well stand together. They were inserted for a well-defined purpose, which it is easy to comprehend; and the Act should be so construed as to give effect to both provisions, and thereby accomplish the purpose of the lawmaker."

From the foregoing, well written opinion of Judge Thayer, it is plain that Congress intended to surrender

the person of the allottee Indian to the state and retain only the control over his land. No restriction was placed upon an allottee's rights as a citizen and none upon the right of a state to legislate concerning him.

In the case of In Re Now-Ge-Zhuck, 76 Pac. 879, it is said:

"It is apparent that by Section 6 of the Act it was the intention of Congress to extend to the Indian, give him the benefit of, and make him subject to the laws, both civil and criminal, of the state or territory in which he may reside, upon the completion of the allotments and the patenting of the lands to the allottees. The only reservation of Federal jurisdiction in the Act of February 8, 1887, is the withholding from the Indian the absolute title of the allotted lands for a period of twenty-five years, or longer if the President of the United States in his discretion extend the period."

In the opinion of said case on page 880 it is said:

"The allotment also constituted the allottee a citizen of the state or territory in which he may reside. It is not to be presumed that the rights of citizenship would be conferred upon the allottee for his benefit, and he be for a period of twenty-five years exempted from the operation of the laws of the state of which he became a citizen."

The Kickapoo tribe of Indians are no longer such a tribe as the framers of the Constitution had in mind when they wrote it. They are in no condition to determine anything as a tribe except what shall be done with the surplus land not allotted on said reservation. Congress can only regulate commerce with those tribes which are

in a condition to determine for themselves with whom they will have commerce or are in a condition to have Congress determine it for them.

ASSUMING THAT INDIANS WHO HAVE RECEIVED THEIR FIRST PATENT FOR LANDS ALLOTTED TO THEM UNDER THE ACT OF 1887 ARE SUBJECT TO THE CIVIL AND CRIMINAL LAWS OF THE STATE, THAT FACT IS INCONSISTENT WITH THE POWER OF CONGRESS TO REGULATE COMMERCE WITH THEM.

If these Indians to whom allotments have been made are citizens of the United States and the state of Kansas and are subject to the laws, both civil and criminal, of the state wherein they reside, they are not under the control of Congress. The control of Congress over the Indians who compose the Indian tribes in this country, has always been based upon the fact that they are wards of the government and under the exclusive jurisdiction and control of Congress.

In the brief of Respondent or page 23 this language is used:

"The observation in The Kansas Indians (5 Wall. 737, 755), that if the Indians are under the control of Congress, 'from necessity there can be no divided jurisdiction,' is manifestly inapplicable where Congress chooses to divide its jurisdiction with the state."

The jurisdiction of Congress over the Indians has

always been based upon the fact that they were wards of the government.

United States vs. Kagama, 118 U. S.., 375.

State vs. Campbell, 53 Minn., 354.

The Respondent argues that this jurisdiction might be divided by Congress with the state. In this case, Congress would have the jurisdiction of a ward of the government to divide with the state.

It is claimed by the government that Congress by the Act of February 8, 1887, gave the state jurisdiction of the person of an allottee and retained the jurisdiction of the allottee's appetite for intoxicating liquor. It seems that such a claim cannot be sustained as the person of an allottee Indian is not a thing which can be divided into parts.

In the brief of Respondent, page 24, it is said:

"Any jurisdiction that the state may have over the Indian's being, derived from Congress, is subject to alteration and repeal by Congress. It follows, therefore, that if the jurisdiction conferred upon the States by the Act of February 8, 1887, over Indian allottees is inconsistent with the Act of January 30, 1897, the former Act must be held to be in so far repealed."

This is not the law. Congress has no power to repeal a former Act of Congress granting jurisdiction in a given matter, to a state, without the consent of the state.

After Congress gave the state of Kansas jurisdiction of the Indian allottees, it lost all control over them and

could not regain jurisdiction of them without the consent of the state.

Fort Leavenworth R. R. Co. vs. Lowe, 114 U. S. 525

In the case of Ft. L. R. R. Co. vs. Lowe, 27 Kan. 760, it is said:

"It takes two parties to make a contract; and it takes the action of both the state government and the federal government, before jurisdiction can be transferred from the state government to the federal government; and, so far as is shown in the present case, only one party has acted—the state of Kansas."

In United States vs. Stahl, 1 Kan. 606, it is said:

"The right to exercise jurisdiction over the crime of murder having been vested in the state of Kansas by the act admitting her as a state, and she never having parted with that right, it cannot belong to the United States."

See also Clay vs. State, 4 Kan. 49.

It seems that before a state can be divested of its jurisdiction over territory or persons within its limits, it must consent to such divestment.

Sinks vs. Reese, 19 Ohio St. 306.

Kansas has never consented to surrender its jurisdiction over the person of an allotte Indian to the fedaral government. If by an Act of Congress the allottee Indians who have become citizens could be made subject to the jurisdiction of the government, then Congress could make any citizen of a state a ward of the government and oust the state of its jurisdiction. This cannot be the law.

Another question, can the citizen, without his consent, be deprived of his political rights and his right to

be protected by the laws of his state? We think not. When a person is a citizen of the United States and of the state in which he resides, it means something, and he cannot be deprived of the rights as such citizen without his consent. Congress has no such power. If Congress had the power to make one citizen a ward of the government, it could make all of the citizens of a state wards of the government and enact police regulations for their protection.

CITIZENSHIP OF INDIAN ALLOTTEES INCONSISTENT WITH GUARDIANSHIP OF CONGRESS.

In the brief of respondent on page 24, it is said: "The Act of February 8, 1887, itself contemplates the further control of Congress."

There is no provision in said Act that provides for the further control of allottee Indians by Congress. The only right reserved to the federal government by said Act is the control of the land and monies of said allottee Indians.

In the case of Beck vs. Flournoy Live-Stock & Real Estate Co., 65 Fed. 35, Judge Thayer very ably discussed the provision of said Act.

In the case of United States vs. Rickert, 106 Fed. 5, 6, Judge Garland discusses the status of allottee Indians.

The Act of Congress of February 8, 1887, imposes a limitation upon the power of alienation of the allottee of the land thus allotted and by a subsequent clause confers the boon of citizenship. Both provisions may well stand together. By said Act, Congress gave up the guardianship of the person of the Indian and retained only the guardianship of his lands and monies.

A guardian is "one to whom the law intrusts the care of the person or property, or both, of another. More specifically, one to whom the law intrusts the care of the person or property, or both, of an infant."

15 A. & E. E. of L. 20, 2nd Ed.

The government can control only the land and monies of the Indian and is therefore only the guardian of their property.

A ward is "one whose person or property, or both, are under the control of a guardian. More specifically, a minor over whose person or property, or both, a guardian has been appointed by lawful authority."

15 A. & E. E. of L. 20, 2nd Ed.

It seems from the foregoing that there may be a guardian of the property of a person and not of his person. This is what the Act of Congress of February 8, 1887, provides for and if the allottee Indians are wards of the government they are wards by virtue of the guardianship of their property. This is not the kind of a ward that the government has the right to legislate concerning.

POWER OF THE FEDERAL GOVERNMENT TO PROTECT THE INDIANS DEPENDENT UPON HIS TRIBAL RELATIONS.

The constitution of the United States and all of the decisions of this court are to the effect that the Indian must be a tribal Indian before Congress can exercise jurisdiction over him.

United States vs. Thomas, 151 U. S. 585.

United States vs. Holliday, 1 Wall. (U. S.) 416.

For all of the foregoing reasons your petitioner should be discharged.

A. E. CRANE,
Attorney for Petitioner.

FILED
JAN 30 1905
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION OF ALBERT HEFF FOR A WRIT OF HABEAS CORPUS. } No. 14 Original.

SUPPLEMENTAL BRIEF OF PETITIONER.

A. E. CRANE,
Attorney for the Petitioner.

Ed. G. Moore & Son, 108 East Sixth Street, Topeka, Kansas.

IN THE

Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION OF ALBERT HEFF FOR A WRIT OF HABEAS CORPUS.

SUPPLEMENTAL BRIEF OF PETITIONER.

An Indian who has received an allotment under the Act of Congress of February 8th, 1887, is a citizen of the United States and the State in which he resides. The Act of Congress of February 8th, 1887, provides in Section 6:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the

rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

It will be noticed that section six provides that Indians may become citizens of the United States in three different ways: *First.* Every Indian to whom allotments shall have been made under the provisions of the Act of Congress of February 8th, 1887. *Second.* Or any Indian who has received any allotment under any law or treaty. *Third.* Every Indian born within the territorial limits of the United States who has voluntary taken up, within said limits, his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life.

United States v. Kopp, 110 Fed. 165.

It will be noticed that the Indians belonging to the second and third class became citizens immediately upon the passage of the Act of Congress of February 8th, 1887. The Indians under the first class were to become citizens as soon as they had received an allotment under the Act of Congress of February 8th, 1887. It is not necessary for the Indian to receive the final patent to become a citizen but he becomes a citizen immediately upon the allotment being made to him. It is suggested in the latter part of section six that the accepting of the allotment by an Indian, a member of a tribe, shall not in any manner impair or otherwise affect the right of any such Indian to tribal or other property. This provision clearly indicates that it was the intention of the law-makers to make them citizens and put them in a position so that they could settle up their business. In the latter part of section five this language is used:

"And hereafter in the employment of Indian police,

or any other employes in the public service among any of the Indian tribes, or bands affected by this Act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this Act and become *citizens* of the United States shall be preferred."

The foregoing language clearly shows that it was intended by the Act to confer upon each allottee the rights of citizenship upon the issuance of the first patent. It makes little difference in this case whether the first patent is called a certificate or a patent, because the rights of citizenship were intended by said act, to be conferred upon each allottee upon the issuance of the first patent or certificate. Congress saw fit to call the first deed a patent, and all through the Act it is referred to as a patent, and for that reason the court must construe the act the same as if they had stated that upon the completion of the allotments and the issuance of the certificates therefor, each and every allottee shall be subject to the laws of the state both civil and criminal.

"Upon the completion of the allotments," means when the allotting agent has completed the allotments and they have been approved by the Secretary of the Interior, then the first patents shall be issued and at that time the allottees will become citizens of the United States. Having become citizens of the United States they would also become citizens of the state in which they reside.

Fourteenth Amend. U. S. Constitution;
Boyd v. The State of Neb., 143 U. S. 162;
Gassies v. Ballon, 6 Peters (U. S.) 761.

The question, whether Indians who have received allotments under the Act of Congress of February 8th, 1887, are citizens, has been decided by a number of courts.

State v. Denoyer, 72 N. W. Rep. 1015;
State v. Morris, 55 N. W. Rep. 1086;

Wa-La-Note-Tke-Tynin v. Carter, 53 Pac. 106;
United States v. Rickert, 106 Fed. Rep. 5;
In Re Now-Ge-Zhuck, 76 Pac. Rep. 877;
Farrell v. United States, 110 Fed. Rep. 942;
People v. Bray, 38 Pac. Rep. 732;
Beck v. Flourney Live Stock & Real Estate Co., 65 Fed. Rep. 35;
Keokuk v. Ulam, 38 Pac. Rep. 1080;
United States v. Hadley, 99 Fed. Rep. 437;
Ells v. Ross, 64 Fed. 417. Opinion by Justice McKenna.

It appears from the reports of the United States Indian agents in charge of the Kansas reservations that lands were allotted in severalty, under the provisions of the act of February 8th, 1887, to all the Indians of the Kickapoo reservation before the end of February, 1895, except to children born since that date. (Ann. Rep. Dep. Int. of 1897, p 151; *id*, 1902, pt. 1, p. 217.)

In *United States v. Kopp*, 110 Fed. 160-166, it is said:

"The Puyallup Indians holding lands under patents of the tenor above set forth are citizens of the United States, having all the rights, privileges and immunities of other citizens, and they are not under guardianship of the United States government nor under the charge of any Indian superintendent or agent, and the statute of 1897 prohibiting the furnishing of intoxicating drinks, flavoring extracts, bitters, and stimulants to Indians having the status and subject to the conditions therein defined, does not comprehend an Indian having the status and the rights, privileges and immunities belonging to the Indian named in this indictment."

It is urged by the respondents in this case that the Act of Congress of January 30th, 1897, is a legislative construction of the prior Act of February 8th, 1887. What are the provisions of said Act? The Act of January 30th, 1897, as far as relevant to this argument, is as follows:

"That any person who shall sell, give away, dispose

of, exchange or barter, any malt, spirituous or vinous liquor, including beer, ale and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound composition, or any article whatsoever, under any name, label, or brand, which produces intoxication to any Indian to whom allotment of land has been made, while the title to the same shall be held in trust by the government, or to any Indian, a ward of the government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the government, through its departments exercises guardianship," etc.

By said Act, it is made a crime for any person to sell or give away intoxicating liquor. *First:* To any Indian to whom an allotment of land has been made, while the title to the same shall be held in trust by the government. *Second:* To any Indian who is a ward of the government, under charge of an Indian superintendent or agent. *Third:* To any Indian, including mixed bloods, over whom the government, through its departments exercises guardianship.

If the foregoing act is a legislative construction of the prior Act of 1887, it may well be said that Congress made a distinction between Indians who had received allotments of land in severalty and wards of the government. From the provisions of this Act, it is claimed that Indians who had received allotments were not considered wards of the government, but occupied a different relation thereto. If such Indians had been considered wards of the government at the time of the passage of said Act, why should they have been referred to as Indians who had received allotments? It is contended by the respondents in their supplemental brief that Indians who have received allotments under the Act of Congress of February 8th, 1887, are not citizens of the United States, and will not be until the period of twenty-five years has elapsed during which time their land is held

in trust by the government. It is urged that this is neccessary for the protection of the Indians and that Congress did not intend to make them citizens of the United States and of the states because they are not qualified for citizenship. In the same act there is a provision that every Indian who has separated himself from his tribe and put on the habits of civilized life shall become a citizen immediately upon the passage of the Act. It is also provided in said Act that every Indian who had theretofore received an allotment under any law or treaty should immediately become a citizen of the United States. If such Indians are qualified to become citizens why should not the Indian who received his allotment under the Act of February 8th, 1887, also be qualified to become a citizen?

In connection with this argument I desire to call this court's attention to the brief of respondent, pages 19 and 20, in which they argue that such Indians are citizens.

It is claimed on page 12 of the supplemental brief of the respondent's that the case of *Ohio v. Thomas*, 173 U. S. 276, holds:

"That a state had no authority to interfere with the administration by Congress of a National Soldiers' Home located within its limits; nor, in the exercise of its police power to regulate or probibit the use of any article of food which had been approved by the management of the Home under the authority of Congress. This conclusion was not based upon the ground that Congress had exclusive jurisdiction over the place where the Home was located, because such was not the fact, the place being within the jurisdiction of the State."

This is misleading as the case was decided solely upon the one fact, that the governor of the Soldiers' Home being a Federal officer and acting under the authority of Congress was not subject to the State laws. In the opinion of said case on page 284, it is said:

"Assuming, in accordance with the decision of the State Court, the Act of the Ohio legislature applies in its terms to the Soldiers' Home at Dayton, in that state, we are of the opinion that the governor was not subject to that law, and the court had no jurisdiction to hear or determine the criminal prosecution in question, because the Act complained of was performed as a part of the duty of the governor as a Federal officer, in and by virtue of said Federal authority, and in the performance of that duty he was not subject to the direction or control of the legislature of Ohio."

The first case is not in point as the rights of a Federal officer is not involved herein, nor is the power of Congress to say what food shall be supplied to a National Soldiers' Home.

In *United States v. Rickert*, 188 U. S. 432, this court made use of language that would indicate that the Indians who held allotments were wards of the Government. This petitioner will concede that they are wards of the Government if it is based upon the fact that the Government acts as the guardian only, over their lands and monies, and not over the person of the Indian. This is clearly within the definition of guardian and ward.

15th Am. & Eng. Enc. of Law, 20 (2d ed.)

It is true that in that case this court points out that the word patent is improperly used to describe the instrument issued by the Secretary of the Interior upon the completion of the allotments. It makes no difference whether they named it a patent or a certificate, the language of the Act is, that upon the completion of the allotments and the patenting of the same, each and every allottee would become subject to the laws of the state, both civil and criminal. It is clear that the law-makers intended that upon the issuance of the patent, or certificate that each allottee should become a citizen of the United States. The question discussed in the *United States v. Rickert*, by this court was, whether or not the

improvements on the allotments and the personal property of the allottee Indians could be taxed, and this court held that they could not. The question of the Indian's citizenship was not raised in this case, but the case itself was decided upon the theory that they were citizens. (Brief of Respondents, pages 19 and 20.)

Congress derives its power to prohibit the sale of intoxicating liquors, in the state, to an Indian from this provision of the Constitution of the United States, to-wit:

"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

When the Constitution was adopted these Indian tribes were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white.

When the Constitution was adopted the Indians were not claimed to be a part of the government of the United States, and therefore, had the right to determine for themselves what commerce they would engage in. In the year 1871 Congress determined upon a new departure; to govern them by Acts of Congress.

Section 2079 Revised Statutes. (Page 18 of brief of Petitioner).

It was provided therein that the Indian tribes within the boundaries of the United States would no longer be treated as independent nations, but should thereafter be ruled by Acts of Congress.

We think that at that time Congress lost all right to control commerce between this government and Indian tribes when off their reservations.

They no longer possessed the necessary character for Congress to exercise such power.

There can be no qualified citizenship because it would, in effect, limit the police powers of the state.

A. E. CRANE,
Attorney for the Petitioner.

[illegible]
NOV 21 1904
JAMES H. MCKENNEY
Clerk

In the Supreme Court of the United States

No. 14, ORIGINAL. OCTOBER TERM, 1904.

IN THE MATTER OF THE APPLICATION OF ALBERT [illegible] FOR A WRIT OF HABEAS CORPUS.

BRIEF OF THE UNITED STATES FOR RESPONDENTS.

In the Supreme Court of the United States.

No. 14, ORIGINAL. OCTOBER TERM, 1904.

IN THE MATTER OF THE APPLICATION OF ALBERT HEFF FOR A WRIT OF HABEAS CORPUS.

BRIEF OF THE UNITED STATES FOR RESPONDENTS.

STATEMENT.

Petitioner was convicted in the District Court of the United States for the District of Kansas of violating the act of Congress of January 30, 1897, c. 109 (29 Stat., 506), entitled "An act to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes." That act provides:

> That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, *to any Indian to whom allotment of land has been made, while the title to the same shall be held in trust by*

the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: *Provided, however*, That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority, in writing, from the War Department, or any officer duly authorized thereunto by the War Department.

SEC. 2. That so much of the act of the twenty-third day of July, eighteen hundred and ninety-two, as is inconsistent with the provisions of this act, is hereby repealed.

The indictment charged that Albert Heff, on or about March 20, 1904, in the first division of the Dis-

trict of Kansas and within the jurisdiction of the District Court—

> did then and there unlawfully sell, give away, and dispose of certain malt, spirituous, and vinous liquors at the town of Horton, in the county of Brown, in the State and District of Kansas, to John Butler, to wit, 2 quarts of beer, more or less, and he, the said John Butler, being then and there an Indian, a member of the Kickapoo tribe of Indians, and a ward of the Government, under the charge of O. C. Edwards, an Indian superintendent, contrary to the form of the statute, etc.

Petitioner was sentenced to be imprisoned in the county jail of Shawnee County, Kansas, for four months, and to pay a fine of $200 and costs, and it was ordered that he stand committed until the fine and costs were paid.

The act of February 8, 1887, c. 119 (24 Stat., 388), is entitled "An act to provide for the allotment of lands in severalty on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Section 1 of that act provides:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulations or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or

> any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located therein in quantities as follows: * * *

Section 3 provides "that the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe."

Section 4 provides that Indians not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, may make selections of public lands not otherwise appropriated in quantities and manner as provided in that act for Indians residing upon reservations.

Section 5 provides:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such

land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. * * *

Section 6 is as follows:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to

all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

ARGUMENT.

The sole question on this application is the constitutionality of the act of January 30, 1897, so far as it relates to Indians who have received allotments of land in severalty under the provisions of the act of February 8, 1887.

There is no dispute as to the facts. As the petition alleges, the Indian to whom the liquor was sold was a member of the Kickapoo tribe. He had received an allotment within the Kickapoo Reservation, in the State of Kansas, and was residing thereon; and there is "an agent and superintendent who was appointed by the Government and who assumes and transacts the business of the Government with and for such allotted Indians." (Pet., p. 2.)

The town of Horton, where the liquor was sold, is 6 or 7 miles from the reservation.

Petitioner contends that the act of January 30, 1897, is unconstitutional as applied to sales of liquor to an Indian who has received an allotment of land under the provisions of the act of February 8, 1887, "because it is provided in said act that each and every Indian to whom such allotments have been made shall be sub-

ject to the laws, both civil and criminal, of the State or Territory in which they may reside."

He also contends "that John Butler, having received an allotment of land in severalty and his patent therefor under the provisions of the act of Congress of February 8, 1887, is no longer a ward of the Government, but a citizen of the United States and of the State of Kansas, and subject to the law, both civil and criminal, of said State."

POWER OF CONGRESS TO REGULATE LIQUOR TRAFFIC WITH THE INDIANS.

The leading case on this subject is *United States* v. *Holliday* (3 Wall., 407), where the act of Congress of February 13, 1862 (12 Stat., 339), which made it a penal offense for any person to sell spirituous liquors "to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States," was held to be constitutional.

In that case the court laid down the following principles:

1. The power to regulate the sale of liquor to Indians is based upon the power of Congress to regulate commerce with the Indian tribes.

2. Commerce with the Indian tribes means commerce with the individuals composing those tribes.

3. Congress may regulate such commerce although it is carried on wholly within the limits of a State, the locality of the traffic having nothing to do with its power to regulate it.

4. In determining whether any particular body of Indians are still to be regarded as a tribe, or have

ceased to hold the tribal relation, the court will follow the action of the executive and other political departments of the Government.

5. Neither the constitution of the State nor any act of its legislature can withdraw the Indians from the influence of an act of Congress which that body has the constitutional right to pass.

These principles have been applied in numerous cases, Federal and State, which are collected in Rose's Notes, vol. 6, p. 528.

In *United States* v. *43 Gallons of Whiskey* (93 U. S., 188), referring to the power of Congress to regulate commerce with the Indian tribes, the court said (p. 195):

> The power is in no wise affected by the magnitude of the traffic or the extent of the intercourse. *As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government,* Congress has the power to say with whom and on what terms they shall deal, and what articles shall be contraband.

TRIBAL ORGANIZATION OF KICKAPOOS NOT AFFECTED BY THE ACT OF FEBRUARY 8, 1887.

Assuming that the power of Congress to regulate commerce with the Indian tribes—including the sale of liquor to them—is dependent upon the existence of the tribal organization, it is apparent, from the legislation of Congress and the action of the Executive Department of the Government, that the tribal relations of Indians receiving allotments and becoming citizens

of the United States under the act of February 8, 1887, were not intended to be affected thereby.

Section 5 of the act of February 8, 1887, contains this provision:

> That at any time after lands have been allotted to *all* the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to *negotiate with such Indian tribe* for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribes shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable, etc.

That section further provides:

> And the sums agreed to be paid by the United States as purchase money for any portion of such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians to whom such reservations belonged, and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of *such tribe or tribes of Indians or the members thereof.*

It appears from the reports of the United States Indian agents in charge of the Kansas reservations that lands were allotted in severalty, under the provisions of the act of February 8, 1887, to *all* the Indians of the Kickapoo Reservation before the end of Feb-

ruary, 1895, except to children born since that date. (Ann. Rep. Dep. of Int. 1897, p. 151; id., 1902, pt. 1, p. 217.)

The Indian appropriation act of March 2, 1895 (23 Stat., 876), provided:

> SEC. 10. That with the consent of a majority of the chiefs, headsmen, and male adults of the Pottowotomie tribe of Indians and the Kickapoo tribe of Indians in the State of Kansas, *expressed in open council by each tribe*, the Secretary of the Interior be, and he hereby is, authorized to cause to be sold, in trust for said Indians, the surplus or unallotted lands of the reservations of the Pottowatomie tribe of Indians of Jackson County, Kansas, and the Kickapoo tribe of Indians in Brown County, Kansas.
>
> * * * * *
>
> That before any of the surplus lands belonging to the Kickapoo tribe of Indians shall be sold under the provisions of this section there shall be allotted by the Secretary of the Interior eighty acres to each of the children of said tribe residing in or adjacent to said reservation who may not have heretofore received any lands: *Provided*, That this section may be adopted or rejected separate and apart from other provisions of this act, by the said Kickapoo tribe.

The act of February 28, 1899, c. 222 (30 Stat., 909), entitled "An act providing for the sale of the surplus lands on the Pottowatomie and Kickapoo Indian reservations in Kansas, and for other purposes," contained similar provisions for the sale of the surplus or unal-

lotted lands of those reservations, with the consent of the majority of the chiefs, headmen, and male adults of those two tribes. Section 5 of that act provided:

> That before any of the surplus lands belonging to either of said tribes of Indians shall be sold under the provisions of this act there shall be allotted by the Secretary of the Interior eighty acres to each absentee of said tribe, and also to each of the children of the members of the respective tribes born since the allotments heretofore made were closed, and to whom allotments have never been made, but all allotments shall be made and accepted subject to existing leases: *Provided*, That in making these allotments the said Pottowatomie children and absentees shall be restricted to the Pottowatomie lands, and the Kickapoo children and absentees to the Kickapoo lands: *Provided, further*, That this paragraph relating to allotments may be adopted or rejected by either tribe separate and apart from and without affecting the other provisions of this act.

In the report of the United States Indian agent for the Kansas reservations of August 14, 1902 (Ann. Reps. Dep. of Int., 1902, pt. 1, p. 217), that official says:

> The Kickapoo Indians readily accepted the proposition, when submitted to them, to allot the surplus land of their reservations to their children born since allotments were closed in February, 1895, and to absentee members of the tribe; and have forwarded a petition signed by a majority of the adult male members of the tribe, and are anxiously awaiting further action thereon.

By the act of March 3, 1903, c. 994 (32 Stat., 982, 1007, sec. 7) section 5 of the act of February 28, 1899, above set forth, was amended by inserting this provision:

> *Provided further*, That in case there are not sufficient surplus lands belonging to either tribe to allot to each child and absentee in quantity as above provided, said surplus lands shall be allotted to each of said children and absentees pro rata, as near as may be, according to legal subdivisions.

The report of the superintendent of the Kickapoo Reservation, dated August 11, 1903 (Ann. Reps. Dept. of Int., 1903, pt. 1, p. 182), contains this statement:

> *Kickapoo Allotment Council.*—By direction of the Indian Office in communication dated April 22, 1903, in pursuance of the act of February 28, 1899, and an act of March 3, 1903, amending section 5 of the act of February 28, 1899, a council of the Kickapoo Indians was called on May 16, 1903, to which all chiefs, headmen, and male adults were invited. In open council, after full explanation by reliable interpreters and free discussion, a majority of the headmen and adults accepted the provisions of the amended enactment, thus agreeing to a pro rata allotment, as provided for in section 5 of the amended act.

It thus appears that in the act of 1887 itself, as well as in subsequent legislation and in executive action pursuant to that act, the continuance of the tribal relation of the Indians referred to was distinctly recognized.

TREATIES WITH KICKAPOOS.

By a treaty with the Kickapoos made at Castor Hill, Missouri, October 24, 1832 (Revision of Indian Treaties, 1873, p. 441), that tribe, in consideration of certain annuities and sums to be paid by the United States, ceded to the United States the lands which had been previously assigned to them in the State of Missouri. The United States, on its part, agreed to "provide for the Kickapoo tribe a country to reside in, southwest of the Missouri River, as their permanent place of residence *as long as they remain a tribe*," and by the treaty assigned, conveyed, and secured to the Kickapoos such a tract, to which the Kickapoos agreed to remove. (Arts. 1, 2, 13.)

By a treaty made May 18, 1854 (Revision of Indian Treaties, 444), the Kickapoo tribe of Indians ceded, sold, and conveyed unto the United States for the sum of $300,000 "all that country southwest of the Missouri River which was provided as a permanent home for them in the treaty of Castor Hill," of October 24, 1832, "saving and reserving in the western part thereof 150,000 acres for a future and permanent home, which shall be set off for and assigned to them by metes and bounds." (Arts. 1, 2.) That treaty further provided:

> ART. 3. The President may cause to be surveyed, in the same manner in which the public lands are surveyed, the reservation herein provided for the Kickapoos; and may assign to each person or family desiring it such quantity of land as, in his opinion, will be sufficient for such person or family, with the understanding

that he, or they, will occupy, improve, and cultivate the same, and comply with such other conditions as the President may prescribe. The land thus assigned may hereafter be confirmed by patent to the parties or their representatives, under such regulations and restrictions as Congress may impose.

The latest treaty with the Kickapoos, concluded June 28, 1862 (Revision of Indian Treaties, 447), as amended, contained these provisions:

ARTICLE 1. The Kickapoo tribe of Indians, believing that it will contribute to the civilization of their people to dispose of a portion of their present reservation in Kansas, consisting of one hundred and fifty thousand acres of land, to allot land in severalty to those members of said tribe who desire to have separate tracts of lands, and have adopted the customs of the whites, and to set apart for the others of said tribe a portion of said reservation, to be held by them in common, or (if a majority of them so elect) provide for them a suitable home elsewhere, to be held by them in common, it is therefore hereby agreed that the Secretary of the Interior shall cause the whole of said reservation to be surveyed in the same manner as the public lands are surveyed, and the quantity of land hereinafter mentioned to be set apart to those of said tribe who desire to have their land in severalty; and, if so elected by a majority of the others of said tribe, the quantity of land hereinafter mentioned to be by such others held in common, and the remainder of the land, after the special reservations herein-

after provided for shall have been made, to be sold for the benefit of said tribe.

ART. 2. It shall be the duty of the Secretary of the Interior to cause to be made an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and heads of families respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind and otherwise incompetent, as to which of these classes they will belong. And thereupon shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief, at the signing of the treaty, one half section; to each other head of a family one quarter section, and to each other person forty acres of land; to include in every case, as far as practicable, to each family their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee, or leased, or otherwise disposed of only to the United

States, or to persons then being members of the Kickapoo tribe, and of Indian blood, with the permission of the President, and under such rules and regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificate, the person(s) to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

ART. 3. At any time hereafter, when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be set apart and placed to their credit severally, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be

subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided*, That, before making any such application to the President, they shall appear in open court, in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens; and shall also make proof, to the satisfaction of said court, that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.

* * * * *

ART. 14. It is further agreed that all rights, title, and interest of the Kickapoos in their present reservation shall cease, and the same is hereby ceded to and vested in the United States, subject to the limitations and for the purposes herein expressed and provided for.

ART 15. Any stipulation in former treaties inconsistent with those embraced in the foregoing articles shall be of no force or effect.

It will be observed that this treaty provided for the division of the Kickapoos into two classes—those desiring lands in severalty and those preferring to continue holding their lands in common; the assignment of lands in severalty to the first class, the tracts so assigned to be "set apart" for the perpetual and exclusive use and benefit of such assignees and their heirs, such tracts to be exempt from levy, taxation, and sale, and assignable in fee only to the United States or

members of the Kickapoo tribe, under the supervision of the Secretary of the Interior; and finally, whenever the President should become satisfied that any of such allottees who were adults and heads of families had become sufficiently intelligent and prudent to control their affairs and interests, the conveyance of the lands assigned to them by patent in fee simple, with the power of alienation, at the same time setting apart and placing to their credit, severally, their proportion of the trust funds of the tribe held by the United States, etc.; it being further provided that "on such patent being issued, and such payments ordered to be made by the President, *such competent persons shall cease to be members of said tribe, and shall become citizens of the United States*, and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

Comparing the provisions of this treaty with those of the act of February 8, 1887, these differences will be perceived: The treaty contemplates the assignment of lands in severalty only to *some* of the members of the Kickapoo tribe, while the act contemplates such assignment to *all* the members of the tribes referred to (sec. 5). The treaty provides for the complete separation from the tribe of those Indians who should be adjudged by the President competent to control their own affairs and interests, and to whom patents in fee for their allotments should be issued; while the act provides for no such separation, but contemplates the continuance of the tribal organization after all the members have received allotments.

WHEN INDIANS WHO HAVE RECEIVED ALLOTMENTS BECOME CITIZENS OF THE UNITED STATES AND SUBJECT TO THE LAWS OF THE STATE.

It will also be observed that under the treaty of 1862 citizenship was to be reserved until the issuance of the patent in fee, after which, it was provided, the lands so patented "shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

It is not quite clear when Congress intended citizenship to attach in the case of allotments under the act of 1887, or when allottees should be entitled to the benefit of and become subject to the laws of the State or Territory in which they may reside. In the cases referred to by petitioner it has been decided, while in others, hereafter referred to, it has been assumed, that those consequences attached upon the receipt of the first patent (so called) for the lands allotted.

In *United States* v. *Rickert* (188 U. S., 432) this court appears also to have assumed that such was the fact. In that case it was held that a State had no authority to tax lands allotted to the Indians under the act of 1887, or the improvements or personal property of the Indians received from the United States and used thereon, while the lands were held in trust by the Government. It was also held that Indians who had received allotments under the act of 1887 were still wards of the Government. No specific reference was made in the opinion, however, to the provisions of section 6, subjecting Indians who have received allotments to the laws of the State or Territory in which they may reside, and declaring them to be

citizens of the United States. But it would be absurd to suppose that the court did not have those provisions in mind in deciding the case. The reference in the opinion to the title of the act of 1887—"An act to provide for the allotment of lands in severalty on the various reservations, *and to extend the protection of the laws of the United States and the Territories over the Indians*," etc.—would indicate otherwise. Besides, unless those provisions applied, the situation would have been the same as that presented in the *Kansas Indians* (5 Wall., 737), and there would have been no pretense of authority on the part of the State to levy the taxes in question. The decision of the Circuit Court was distinctly based upon the ground that under the legislation of Congress the Indians referred to were "citizens of the United States and of the State of South Dakota," and "entitled to the benefits of and subject to the laws, both civil and criminal, of the State of South Dakota." (*United States* v. *Rickert*, 106 Fed., 1, 5.)

ASSUMING THAT INDIANS WHO HAVE RECEIVED THEIR FIRST PATENT FOR LANDS ALLOTTED TO THEM UNDER THE ACT OF 1887 ARE SUBJECT TO THE CIVIL AND CRIMINAL LAWS OF THE STATE, THAT FACT IS NOT INCONSISTENT WITH THE POWER OF CONGRESS TO REGULATE COMMERCE WITH THEM.

The distinction between regulations of commerce and ordinary criminal legislation is recognized in *United States* v. *Kagama* (118 U. S., 375). It was contended in that case that the act of Congress of March 3, 1885, making certain offenses committed by one Indian against the person or property of another Indian

within a Territory subject to its criminal laws, was an exercise of the power of Congress to regulate commerce with the Indian tribes. But the court, referring to the constitutional provision containing the grant, said (p. 378):

> This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws, justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

The act was sustained, however, upon broader grounds: (1) As an exercise of the sovereignty of the United States over the Territories and its ownership of the country which they comprised; and (2) as authorized by the exclusive jurisdiction and control of Congress over the Indians, within the limits of the United States, whether in the States or in the Territories.

In the very case upon which petitioner relies—*State* v. *Campbell* (53 Minn., 354)—the Supreme Court of Minnesota recognized the fact that its criminal jurisdiction was limited by the power of Congress to regu-

late commerce with the Indian tribes. As stated in the headnote, the court there held:

> Unless otherwise provided by treaty with an Indian tribe, or by the act admitting the State into the Union, the criminal laws of the State, *except so far as restricted by the authority of Congress "to regulate commerce with the Indian tribes,"* extend to all crimes committed on an Indian reservation by persons other than tribal Indians.

It was further held in that case that—

> Indians, while preserving their tribal relations and residing on a reservation set apart for them by the United States, are the wards of the General Government, and as such the subjects of Federal authority, and the power to legislate for them is exclusively in Congress. And for acts committed within the limits of the reservation they are not subject to the criminal laws of the State.

The case of *United States* v. *Ward*, McCahon's Reps., 199 (Circuit Court, D. Kansas, 1863), also relied upon by petitioner to show that there can be no divided jurisdiction over the Indians, merely held that the State of Kansas had exclusive jurisdiction to try a white man for the murder of another white man committed upon an Indian reservation in that State. This is no more than was held in *United States* v. *McBratney* (104 U. S., 621) and *Draper* v. *United States* (164 U. S., 240).

In *Utah and Northern Railway* v. *Fisher* (116 U. S., 28), the court held that the Fort Hill Indian Reservation, not having been excluded from the limits of the Territory of Utah by the act creating it, or by the

treaty with the Indians located thereon, the Territory had general jurisdiction over such reservation in matters not interfering with the protection of the Indians by the Federal Government in accordance with treaty stipulations.

The observation in *The Kansas Indians* (5 Wall., 737, 755), that if the Indians are under the control of Congress, "from necessity there can be no divided jurisdiction," is manifestly inapplicable where Congress itself chooses to divide its jurisdiction with the State. In that case the court was referring to the right of the State of Kansas to tax lands in that State held in severalty by individual Indians, and it was held that it could not, not only because of treaty stipulations, but because while the Indians maintained their tribal organization they were under the exclusive jurisdiction of the General Government.

If under the exclusive jurisdiction of the General Government, then Congress has the right to say by what laws they shall be governed; and it is immaterial, so far as the question of power is concerned, whether Congress decrees that they shall be governed solely by legislation enacted by itself in the first instance or partly by the laws of the State or Territory in which they reside.

It had early been settled that the States were without authority to extend their laws, civil and criminal, over the Indian tribes residing within their limits.

Worcester v. *Georgia*, 6 Pet., 515.
Fellows v. *Blacksmith*, 19 How., 366.
United States v. *Kagama*, 118 U. S., 384.

When, therefore, Congress, by the act of February 8, 1887, in the exercise of its plenary and exclusive authority over its Indian wards, made them, as has been assumed, citizens of the United States, and subject to the laws, civil and criminal, of the State or Territory in which they may reside, upon what theory can it be said that it could not reserve, as the act of January 30, 1897, shows it intended to do, the power to regulate commerce with them as members of their respective tribes? Any jurisdiction that the States may have over the Indians being derived from Congress, is subject to alteration and repeal by Congress. It follows, therefore, that if the jurisdiction conferred upon the States by the act of February 8, 1887, over Indian allottees is inconsistent with the act of January 30, 1897, the former act must be held to be in so far repealed.

CITIZENSHIP OF INDIAN ALLOTTEES NOT INCONSISTENT WITH GUARDIANSHIP OF CONGRESS.

The act of February 8, 1887, itself contemplates the further control of Congress. Assuming that it confers citizenship, it at the same time imposes restraints and limitations upon the Indians inconsistent with any other theory than that of their continuing wardship. The title to the lands allotted to them is to be held in trust for them by the Government for twenty-five years, with discretionary power in the President to extend the period in any case. So, too, the act forbids any conveyance of such lands or any contract touching them before the expiration of such period; while later acts only allow the allottee to lease his lands for par-

ticular purposes and for short periods, under the supervision of the Secretary of the Interior (act February 28, 1891, c. 383, 26 Stat., 794; act August 15, 1894, c. 294, 28 Stat., 285; act March 2, 1895, c. 188, 28 Stat., 876; act May 31, 1900, c. 598, 31 Stat., 221). The guardianship of the United States in this respect is recognized in—

> *Cherokee Nation* v. *Hitchcock*, 187 U. S., 307–8.
>
> *Lone Wolf* v. *Hitchcock*, 187 U. S., 567.

The act of February 8, 1887, also provides that money paid by the United States for the purchase of the surplus lands of any of the tribes authorized to be sold after all the members thereof have received allotments is to "be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians to whom such reservations belonged; and the same, with the interest thereon at three per cent per annum, *shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof.*" (Sec. 5.)

The continuing guardianship of the General Government is recognized in the Indian appropriation act of March 3, 1891, c. 543 (26 Stat., 987, sec. 1), which provides:

> That in the expenditure of money appropriated for any of the purposes of education of Indian children, those children of Indians who have taken land in severalty under any existing law, shall not, by reason thereof, be excluded from the benefits of such appropriation.

Prior appropriation acts contained a like provision.

Appropriations are annually made for the support and education of the Kansas Kickapoos. (31 Stat., 243, 1080; 32 Stat., 271, 1004; 33 Stat., 213.)

It is difficult to understand why the United States may not exercise the same care and control over its Indian citizens, if incompetent to take care of themselves, that a State exercises over its dependent, ignorant, or afflicted citizens. It does not follow because a person is a citizen that he is in every respect *sui juris.* Infants, insane persons, and married women, although citizens, have always been the subject of special legislation on the part of the States, and it is a common thing for the States to restrict the sale of liquor and other noxious articles to minors.

In *Crowley* v. *Christensen* (137 U. S., 86), the court said (p. 91):

> There is no inherent right in a citizen to thus sell intoxicating liquors by retail; *it is not a privilege of a citizen of a State or of a citizen of the United States.* As it is a business attended with danger to the community it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils.

That an Indian may be endowed with citizenship and still need the protecting care of government is recognized by the court in *United States* v. *Ritchie* (17 How., 525). In that case it appeared that the organic law of the Mexican Republic had declared the Indians of Mexico citizens, presumably in recognition of their

services in throwing off the Spanish yoke. It had invested them with the privileges of citizenship, said Mr. Justice Nelson in delivering the opinion of the court, as effectually as the Declaration of Independence had invested all persons with those privileges who resided in this country at the time and adhered to the interests of the Colonies. But he added (pp. 539–540):

> The improvement of the Indians under the influence of the missionary establishments in New Spain, which had been specially encouraged and protected by the mother country, had, doubtless, qualified them *in a measure* for the enjoyment of the benefits of the new institution. In some parts of the country very considerable advancement had been made in civilizing and Christianizing the race. *From their degraded condition, however, and ignorance generally, the privileges extended to them in the administration of the Government must have been limited; and they still, doubtless, required its fostering care and protection.*

The case of *United States* v. *Rickert* (188 U. S., 432) seems decisive of this question of guardianship. Referring to the character of the relations between the United States and the Indians after the passage of the act of February 8, 1887, the court said (p. 437):

> These Indians are *yet* wards of the nation, in a condition of pupilage or dependency, *and have not been discharged from that condition.* They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of

> 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship.

Again (p. 442):

> It is not a relation simply of contract, each party to which is capable of guarding his own interests, but the Indians are in a state of dependency and pupilage, entitled to the care and protection of the Government. When they shall be let out of that state is for the United States to determine without interference by the courts or by any State.

In reply to the question whether the United States had such an interest in that controversy or its subjects as entitled it to maintain that suit, the court said (p. 444):

> In view of the relation of the United States to the real and personal property in question, *as well as to these dependent Indians still under national control*, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the Government with reference to the Indians, it is clear that the United States is entitled to maintain this suit. No argument to establish that proposition is necessary.

In conclusion the court said (p. 445):

> Some observations may be made that are applicable to the whole case. It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily be-

> long to citizens, and that they ought therefore to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. *It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship.* That is a political question which the courts may not determine. We can only deal with the case as it exists under the legislation of Congress.

As already observed, the court in this case must have assumed that the provisions of section 6 of the act of 1887 made Indians who had received their first patent for allotments thereunder subjects to the laws of the of the State and citizens of the United States.

The District Court denied petitioner's contention as to the unconstitutionality of the act of January 20, 1897, upon the authority of *Farrell* v. *United States* (110 Fed., 942), decided by the Circuit Court of Appeals for the Eighth Circuit. That case was similar to this in its facts. Farrell had been convicted of selling liquor in South Dakota to a mixed-blood Indian of the Sioux tribe, in charge of the agent of the Sisseton Agency. It further appeared that under the constitution and laws of South Dakota the Indian, by reason of his United States citizenship (which the court assumed had been conferred upon him by the act of February 8, 1887), was also a citizen of that State. In a well-considered opinion by Judge Sanborn, in which the legislation of Congress and the relations of the Federal Government with the Sisseton and Wahpeton

tribes were reviewed, the court reached the conclusion that the Congress had never renounced its power to regulate commerce with those Indians, and that the act of January 30, 1897, was neither unconstitutional nor inapplicable to the case presented. At the close of the opinion occurs this résumé (p. 952):

> But the considerations to which reference has now been made are persuasive that the courts ought not to hold that Congress has renounced its power to prohibit the traffic in intoxicating liquors with Indians who have taken their allotments and patents under the act of 1887, but for whom the Government still hold their lands in trust, until the legislative department of the Government gives more positive indications of its intention so to do. The original condition of these Indians as wards of the Government; the original power of Congress to regulate commerce with them; the settled policy and practice of the nation to prohibit traffic with them in intoxicating liquors; the stipulation of the treaty of 1867 that the Government would appoint an agent, whose duty it has always been to suppress this traffic; the absence of any condition in the act of 1887 requiring allottees to surrender their tribal relation or tribal property; the continuing need of the suppression of the liquor traffic with them while the Government holds their lands in trust for the individual Indians as well as while it held them in trust for the same Indians collectively; the absence of any express renunciation of its power by Congress, and of any treaty or act of Congress repugnant to its retention and

exercise; the holding of both the legislative and executive departments that it still exists, notwithstanding the allotments and patents under the act of 1887; the uniform exercise of this authority and the continuing endeavor of these departments to suppress this baleful traffic in spirituous liquors with these Indians since their patents were issued as before, compel the conclusion that Congress has never renounced its power to regulate this commerce, and that the act of 1897 is neither unconstitutional nor inapplicable to the case at bar.

Prior to the decision of this court in *United States* v. *Rickert*, above cited, it had been repeatedly and uniformly held by the Federal courts that the act of February 8, 1887, in conferring United States citizenship, as it was assumed, did not change the status of Indian allottees as wards of the Government or abolish the reservations.

Eells v. *Ross*, 64 Fed., 417, 419, Circuit Court of Appeals, North Circuit.

United States v. *Logan*, 105 Fed., 240, 241, Circuit Court, District of Oregon.

United States v. *Flournoy Live Stock, &c., Co.*, 69 Fed., 886, Circuit Court, District of Nebraska.

United States v. *Mullin*, 71 Fed., 682, 685, District Court, District of Nebraska.

In *United States* v. *Belt*, 128 Fed., 168, the District Court, M. D. Pennsylvania, held that the act of January 30, 1897, included within its protection Indian students at the Carlisle School.

See also—

United States v. *Kiya*, 126 Fed., 879, 881, District Court, D. North Dakota.

In re Lincoln, 129 Fed., 247, District Court, N. D. California.

In *Mulligan* v. *United States* (120 Fed., 98) the Circuit Court of Appeals for the Eighth Circuit also held that an indictment was good which charged the defendant with selling liquor to "an Indian and a member of the prairie band of Pottawatomie Indians, and a ward of the Government, under the charge of W. R. Honnell, an Indian agent," when the proof showed that he was also an Indian to whom an allotment of land had been made, the title to which was held in trust by the Government under the act of February 8, 1887. The court held that in such case the Indian fell within both of the prohibited classes in the act of January 30, 1897. This is the situation in the present case. The Kickapoo Indian here referred to might also come within the third class designated in the act of January 30, 1897, namely, "any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship." These several provisions indicate that the manifest purpose of that act was to protect all classes and conditions of Indians under the control of the Government.

POWER OF THE FEDERAL GOVERNMENT TO PROTECT THE INDIANS NOT DEPENDENT UPON THE PRESERVATION OF TRIBAL RELATIONS.

This question is not necessarily involved in this case, since, as above set forth, the tribal organization

of the Kickapoos has been preserved. But an inquiry into the authority of Congress over the Indians would be incomplete without some reference to it.

There have been expressions by this court in some cases which might be taken to indicate that upon the dissolution of the tribal organization Congress would lose its control over the Indians. But what the court was considering in those cases was not when the control of the General Government would cease, but when any jurisdiction on the part of the State would accrue. Thus, in the *Kansas Indians* (5 Wall., 737), the question was simply whether the holding by Indians of lands in severalty within the limits of that State gave the State the right to tax them, and the court said that as long as the tribal organization was maintained they were under the *exclusive* jurisdiction of the United States.

So, in *United States* v. *Kagama* (118 U. S., 375), the court said (p. 379):

> They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

There is nothing in such expressions to warrant the conclusion that a dissolution of the tribal relation would

divest the General Government of its control over the Indians. While it might have the effect of destroying their position as a semi-independent people, and also subject them in some respects to the jurisdiction of the State in which they might reside, it can not be held to deprive or relieve the General Government, without its consent, of its powers, duties, and obligations in regard to them.

From the adoption of the Constitution the Indians have been under the exclusive control of the General Government. This has been repeatedly recognized by this court.

> *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S., 641, 653.
>
> *Stephens* v. *Cherokee Nation*, 174 U. S., 445, 484.

In *United States* v. *Kagama*, the court said (118 U. S., 384):

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied, and because it alone can enforce its laws on all the tribes.

The Indians being originally under the exclusive control of the General Government, it would seem to

follow that in its treatment of them it may confer upon them such rights and privileges and upon the States such jurisdiction over them as it deems best for their interests.

The power of the General Government to protect the Indians is coextensive with its power to protect any other person or thing under its jurisdiction or control. Thus it may, by special legislation, protect the United States mail and the United States mail carriers. The fact that those subjects are within the limits and to some extent subject to the jurisdiction of the States does not take them out of the protection of the General Government. Its jurisdiction in such cases is dependent upon the nature of the subject-matter, not upon its locality.

In *United States* v. *Kagama* the court, referring to the clause of the act of Congress of March 3, 1885, which relates to crimes committed by one Indian against the person or property of another Indian upon Indian reservation within the boundaries of a State, said (118 U. S., 383):

> The statute itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitations in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State and made it punishable within the courts of the United States. But Congress *has* done this, and *can* do it with regard to all offenses relating to matters to which the Federal authority extends.

In *State* v. *Campbell* (53 Minn., 354), cited by petitioner, the Supreme Court of Minnesota said that in *United States* v. *Kagama* this court had very distinctly developed and announced the doctrine that—

> the jurisdiction of the Federal Government over these Indian tribes rests, not upon the ownership of and sovereignty over the country in which they reside, but upon the fact that, as the wards of the General Government, they are subjects of the Federal authority within the States as well as within the Territories.

In *Renfrow* v. *United States* (3 Okla., 166) the Supreme Court of Oklahoma held that it was unlawful, under section 2139, Revised Statutes, to sell liquor to an Indian who had received an allotment of lands *and whose tribe had been dissolved*, while he was still under the control of an Indian agent. In that case, the court said (pp. 172–3):

> There seems to be a contention upon the part of counsel below that, because these Indians have become, under the laws of the United States, naturalized citizens, that therefore people are at liberty to deal with them to the same extent as they would with white citizens. We think counsel are in error in this regard. These Indians may be citizens of the United States, and yet not possessed of all the privileges given to other citizens. There is such a thing as a qualified citizenship.
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> * * * * *
>
> As to the question of the length of time these Indians have been citizens, and also as to

> whether they became citizens under the act of 1887, *supra*, or in Kansas, in 1866, is, we think, immaterial. The statement of facts shows that they bear the same relation to the General Government, to the Indian department, and to the Indian agent at Sac and Fox Agency as do the other Pottawatomie Indians. Neither do we think it matters whether they are full-blood Indians, or less than full-blood Indians. The relation they bear to the General Government, by treaty stipulations, is that of Indians still to some extent under the control of the Indian department.

From the power granted to Congress to regulate commerce with the Indian tribes has been developed the theory as to the guardianship of the United States over them, not only collectively, but individually. The ultimate object of the paternal care exercised by the General Government has been, as is well known, to fit the Indians for the duties and responsibilities of citizenship. In the attainment of that object it will eventually become necessary to dissolve their tribal relations. At that particular period in their development the care and protection of the General Government will be most essential to their welfare. It can not be that they will be deprived of its sustaining arm in the hour of their greatest need.

The case of *United States* v. *Rickert*, above cited, seems conclusive of the proposition that the termination of the Indian's condition of dependency, pupilage, or wardship rests entirely upon the will of Congress,

and is not affected by the considerations of citizenship or tribal relation.

For the reasons above set forth, the petition for a writ of habeas corpus should be denied.

HENRY M. HOYT,
Solicitor-General.

O

In the Supreme Court of the United States.

No. 14. ORIGINAL. OCTOBER TERM, 1904.

IN THE MATTER OF THE APPLICATION OF ALBERT HEFF FOR A WRIT OF HABEAS CORPUS.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

When Indians who have received allotments become citizens of the United States and subject to the laws of the State.

As pointed out in the Government's original brief (pp. 19, 20), it is not clear from the act of February 8, 1887, when Congress intended citizenship of the United States and subjection to State legislation to attach in the case of Indians receiving allotments thereunder. Assuming, however, for the sake of argument—for otherwise the petitioner's plea that there can be no divided jurisdiction over the Indian would have no support whatever—that those consequences attached upon the receipt of the first patent by allottees, I endeavored to show that such fact was not inconsistent with the power exercised by Congress in the act of January 30, 1897, to regulate the liquor traffic with them.

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But, as stated upon the argument, nothing was intended to be conceded upon the point in question. On the contrary, the Government contends that if this court should be of the opinion that Congress could not constitutionally regulate trade and commerce with Indian allottees after they had become citizens of the United States and subject to the laws of the State in which they reside, it necessarily follows that the assumption that those consequences attached when an allottee receives his first patent under the act of 1887 is incorrect and must be abandoned.

The act of 1897 must be taken as a legislative interpretation of the act of 1887; and as the act of 1897 plainly shows that Congress regarded Indians who had received allotments of lands in severalty as being under its protection while the title to such allotments was held in trust for them by the Government, the act of 1887 must be given such construction as will make it accord with that view. In other words, the relations of the United States with the Indians being, as this court has repeatedly held, a political matter, for the determination of Congress alone, the courts, where the intention of Congress in defining those relations in a particular act is doubtful, will accept and follow the construction which Congress may, in a later act, put upon its prior legislation; *a fortiori*, when a different construction would render the later act unconstitutional. The principle of a legislative construction of a prior act has been recently restated and approved. (*Johnson* v. *Southern Pacific Company*, decided December 19, 1904, and authorities cited.)

The act of 1887 provides (sec. 6) that "upon the *completion* of said allotments *and the patenting* of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws, both civil and criminal, of the State or Territory in which they may reside."

Were it not for the fact that every court that has considered this language at all has assumed it to mean that an Indian becomes entitled to the benefit of and subject to the laws of the State in which he resides upon the receipt of his first patent, the natural inference would be that Congress intended those consequences to attach only when the allotments referred to had been fully completed and the final patent issued. But in spite of the array of cases upon this subject, it will be found, upon examination, that in none of them was the provision referred to carefully analyzed and discussed, and that from first to last it has been merely a matter of assumption.

Upon the subject of citizenship, section 6 provides that "every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act or under any law or treaty, * * * is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens."

It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian becomes subject to the laws of the State or

Territory in which he resides. As a matter of constitutional law, an Indian appears to be entitled to the benefit of and to be subject to the laws of the State in which he resides the moment he becomes a citizen of the United States. By virtue of the Fourteenth Amendment a citizen of the United States becomes, by residence therein, a citizen of the State, and entitled to all the rights, privileges, and immunities of other citizens of the State and to the equal protection of its laws. (*The Slaughter House cases*, 16 Wall., 36.)

The view that allottees, under the act of 1887, do not become citizens of the United States and subject to the laws of the State in which they reside until their allotment is completed by the issuance of the final patent, puts this act in accord with the treaty of July 28, 1862, referred to in the original brief (p. 14 et seq.) That treaty, as there stated, provided for the division of the Kickapoos into two classes—those desiring lands in severalty and those preferring to continue holding their lands in common; the assignment of lands in severalty to the first class, such assignments to be represented by "certificates," issued by the Commissioner of Indian Affairs, specifying the names of the individuals to whom they had been made and stating that the tracts so assigned had been "set apart" for the perpetual and exclusive use and benefit of such assignees and their heirs, such tracts to be exempt from levy, taxation, and sale, and assignable in fee only to the United States or members of the Kickapoo tribe, under the supervision of the Secretary of the Interior; and finally, whenever the President should become satisfied that any of such

allottees who were adults and heads of families had become sufficiently intelligent and prudent to control their affairs and interests, *the conveyance of the lands assigned to them by patent in fee simple*, with the power of alienation, at the same time setting apart and placing to their credit, severally, their proportion of the trust funds of the tribe held by the United States, etc.; it being provided that "*on such patent being issued*, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe and shall become citizens of the United States, and *thereafter* the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens."

In *United States* v. *Rickert* (188 U. S., 432, 436) the court points out that the word "patents" was improperly used in section 5 of the act of 1887 to describe the instrument to be issued by the Secretary of the Interior when the allotments provided to be made are approved, since the legal title to the lands allotted remained in the United States and would not be extinguished until the conveyance in fee at the end of the period of trust. In other words, the first patent (so called), referred to in the act of 1887, was merely the equivalent of the "certificate" which, under the treaty of 1862, the Commissioner of Indian Affairs was to issue upon the assignment of lands in severalty to the Kickapoos, and in both cases the patent, properly speaking, was the instrument by which the fee in the lands allotted was to be conveyed.

It appears from an examination of the acts of Congress that in providing for the allotment of lands in severalty among the various tribes of Indians residing upon reservations located in the *States*, Congress has followed the policy indicated in the act of 1887 of coupling with the allotment a reservation of the title in the United States for a period of twenty-five years, or longer, at the discretion of the President. As to those tribes located in the Indian Territory, however, a somewhat different policy has been pursued, suggested, it appears, by the fact that Congress wished to erect that Territory into a State.

Thus the act of March 3, 1893 (27 Stat., 612), provides:

> SEC. 15. The consent of the United States is hereby given to the allotment of lands in severalty, not exceeding one hundred and sixty acres, to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; *and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States*, and the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; *and upon the allotment of the lands held by said tribes, respectively, the reversionary interest of the United States therein shall be relinquished and shall cease.*

Section 16 provided for the appointment of the "Dawes Commission," and for extinguishing the national or tribal title to any lands within the Indian Territory, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of each nation or tribe, with a view to the ultimate creation of a State or States of the Union embracing the lands within that Territory.

Pursuant to this authority, an agreement (ratified and approved by the act of Congress of June 28, 1898, 30 Stat., 495) was made with the Choctaw and Chickasaw nations by which it was provided that those tribes should allot their lands among their members; that from the lands allotted the allottee should select a homestead of 160 acres, which should be inalienable for twenty-one years from the date of patent; the remainder of the lands to be alienable, but no allottee to lease his land for a longer period than five years. Upon the completion of the allotments patents were to be executed and delivered to the allottees, the acceptance of which would operate as an assent on their part to the arrangement. It was also provided "that the Choctaws and Chickasaws, *when their tribal governments cease*, shall become possessed of all the rights and privileges of citizens of the United States."

That act also ratified an agreement with the Creek Indians, providing for the allotment to each citizen of that nation of 160 acres of land, to be confirmed by a patent from the principal chief of the nation. It was

also provided that "the United States agrees to maintain strict laws in the territory of said nation against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality;" and that "all citizens of said nation, *when the tribal government shall cease*, shall become possessed of all the rights and privileges of citizens of the United States."

The act of July 1, 1898 (30 Stat., 567), ratified an agreement with the Seminole Indians for the allotment of lands in severalty among the members of that nation. It provided that when the tribal government should cease a deed in severalty should be delivered to each allottee, operating as a relinquishment of right and guaranty of title by the United States, and as a relinquishment of interest by the allottee in other tribal lands. A tract of 40 acres for each allottee was made inalienable and nontaxable as a homestead in perpetuity.

By this agreement the United States agreed to maintain strict laws in the Seminole country against the introduction, sale, barter, or giving away of intoxicants of any kind, but nothing was said upon the subject of citizenship.

Later acts of Congress have changed or restricted, to a greater or less degree, the power of the Indians above mentioned to alienate or encumber their allotments; but the provisions of the prior acts and agreements as to the nature of the title received by the allottee and upon the subject of citizenship have not been altered.

It will be observed that all of this legislation contemplates the continuance of the relation of guardian and ward between the United States and the tribes in the Indian Territory, despite the fact that the title of the allottees to their lands has been guaranteed and confirmed by the United States. It will also be observed that citizenship is deferred until the tribal governments shall cease.

This being the condition of the Indians in the Indian Territory, although possessing the legal title to their allotments, it would certainly seem that Congress intended to maintain its attitude of guardian and protector over the Indians in the States while the title to their allotments was held in trust by the United States, and consequently that citizenship and subjection to State legislation, if inconsistent with the maintenance of its guardianship, was not intended to be conferred until the expiration of the trust period.

An interesting and significant fact bearing upon the power of Congress to protect the Indians in the Indian Territory after it becomes a State, is presented by the Congressional Record of January 12, 1905. On that day Senator Gallinger laid before the Senate a large number of petitions from the Indian Territory, apparently from both whites and Indians, praying, he said, "that in our legislation the provisions of our treaties with the Indians shall be observed and continued, so that, so far as the Indian Territory is concerned, they shall have prohibition in the future as they have had

in the past." One of these petitions, signed by 76 Choctaw Indians, read as follows:

> We, the undersigned Choctaw Indians, in attendance at a big meeting at Mount Zion, Choctaw Nation, do most earnestly petition your honorable body to make such provision in the approaching statehood bill as is necessary to prohibit the introduction and sale of intoxicating drinks within our bounds, in accordance with the agreement made with the several tribes before allotment.

Will it be said that Congress could not make such provision in the statehood bill for the protection of these Indians, because of the fact that, upon the admission of the new State, they would become citizens of the United States and subject to the laws of the State?

Line of argument made in original brief still adhered to.

While urging the view that the act of 1887, properly construed, did not intend to make Indians receiving allotments thereunder citizens of the United States and subject to the laws of the State in which they reside until they had received the final patent for their allotments, I still contend that it is within the power of Congress, even if those consequences attached upon the receipt of the first patent (so called), to reserve the power to regulate trade and commerce with him.

Whatever the opposing considerations may be, I do not think the court would be justified in holding that

such allottees are citizens of the United States and subject to the laws of the State if that would mean the withdrawal of them absolutely from the protection of Congress. I see no necessity for any such consequence. It is contended that an Indian can not be a citizen of the United States and a ward of the Government at one and the same time, and yet, in the same breath, it is admitted that these allottees are still wards of the Government in respect of their property. It is anomalous, it is said, to think of a citizen of the United States who is a ward of the Government; but in the practical administration of government there are many anomalies, and the situation of the Indian from the beginning has been anomalous. It is anomalous to think of the United States acting as guardian or trustee for any citizen or class of citizens, and yet, admittedly, that is its relation to these allottees in respect of their property.

It is manifest that Congress, in the act of 1887, imposed the limitations which it did upon allotments made in pursuance of that act, not simply for the purpose of protecting the property of the Indians, but to protect the Indians by protecting their property. In other words, this feature of the act distinctly shows that Congress had not renounced its guardianship *over his person*—that he was still to be regarded as a ward of the Government. Later acts, referred to in the original brief, including the act of 1897, are but further illustrations of that fact.

Ordinarily a citizen of the United States must look, in the first instance at least, to the State in which he

resides for the protection of his rights of person and property; but it is to be observed that he may occupy other relations to the General Government than that of citizenship, in which event the duty to protect him will devolve primarily upon the United States. The authority of the United States to legislate for the protection of its officers and agents, though citizens of the United States and of the State in which they reside, can not be questioned. And if it can legislate for the protection of its officers and agents, why can not it legislate for the protection of its wards?

In *Ohio* v. *Thomas* (173 U. S., 276) this court held that a State had no authority to interfere with the administration by Congress of a national soldiers' home located within its limits; nor, in the exercise of its police power, to regulate or prohibit the use of any article of food which had been approved by the management of the home under the authority of Congress. This conclusion was not based upon the ground that Congress had exclusive jurisdiction over the place where the home was located, because such was not the fact, the place being within the jurisdiction of the State.

The necessary inference to be drawn from this decision is that the inmates of a soldiers' home, although generally within the jurisdiction and protection of the State, are nevertheless subject to the regulation and control of Congress. And it inevitably follows, that if the States can not regulate or prohibit the purchase and use for such inmates of articles of food or drink,

Congress may do so; and hence it can pass a law forbidding the sale of liquor to them. If it may do this, simply because of the special interest it has in their welfare, why may it not, for like reasons, legislate for the protection of its Indian wards, who have received allotments of land in severalty under the act of 1887, although like the old soldiers, they may be citizens of the United States and subject generally to the laws of the State in which they reside?

But we may go a step further. Why are allotments held in trust for twenty-five years or longer; what is the legal meaning and effect of such a trust? Not only, in general, to create a tentative and probationary status, which would enable Congress to observe during a sufficient period, and determine, whether, in fact, pursuant to our policy and duties toward the Indian, he can walk alone and his property rights and personal destiny be committed to his own untrammeled guidance; but also to withdraw the experimental gift, if necessary. That is to say, if results should show, in the judgment of the legislature, that it is disastrous or unwise for themselves or the people at large, to place such Indians in this situation, then the nature of this trust relation would enable Congress to reestablish the *status quo ante*, and, so far as the rights of settlers and third parties had not attached and vested, renew completely the tribal relation and turn the Indians and their allotments back into a reservation. This is merely another way of saying that either allottees do

not become citizens of the United States and subject to State legislation until the final patent has issued, or that they are endowed with a qualified citizenship only, and are not removed entirely from the protection and control of the General Government.

HENRY M. HOYT,
Solicitor-General.

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FILE COPY.

SUPREME COURT OF THE UNITED STATES.

Office Supreme Court U. S.
FILED
NOV 28 1904
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1904.

IN THE MATTER OF THE APPLICATION OF ALBERT HEFF.
NO. 14, ORIGINAL.

RETURN TO RULE TO SHOW CAUSE, ETC.

Supreme Court of the United States.

No. 14, Original. October term, 1904.

EX PARTE. IN THE MATTER OF ALBERT HEFF, PETITIONER.

On consideration of the petition of Albert Heff.

It is now here ordered by the court that cause be shown by W. H. Mackey, United States marshal in and for the district of Kansas, and the keeper of the county jail of Shawnee County, Kansas, before this court, at the city of Washington, on Monday, November 28th, 1904, at 12 o'clock noon of that day, or as soon thereafter as counsel can be heard, why a writ of habeas corpus should not be awarded as prayed.

November 7, 1904.

A true copy. Test:

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Indorsed): Supreme Court of the United States. October term, 1904. Term No. 14, original. Order. Filed Nov. 7, 1904.

In the Supreme Court of the United States.

No. 14, Original. October term, 1904.

EX PARTE. IN RE ALBERT HEFF, PETITIONER.

The respondents, William H. Mackey, jr., United States marshal in and for the district of Kansas, and A. T. Lucas, keeper of the county jail of Shawnee County, Kansas, for their return to the order of this court under date of November 7th, 1904, to show cause why a writ of habeas corpus should not be awarded as prayed for by the petitioner, say:

That the petitioner came into their custody and was held by them under the authority of the judgment and order set forth in the petition for a writ of habeas corpus herein filed; and

That on the 10th day of November, 1904, the said petitioner having executed and filed a bond conditioned according to law in the penal sum

of one thousand dollars ($1,000), duly approved by the district judge for the district of Kansas, in pursuance of the order of this court, issued on November 7th, 1904, these respondents discharged the said petitioner from their custody.

Whereupon these respondents say that for the reasons above set forth no writ of habeas corpus should be awarded by this court.

WILLIAM H. MACKEY, Jr.,
United States Marshal for the District of Kansas.
A. T. LUCAS,
Keeper of the County Jail of Shawnee Co., Kansas.

STATE OF KANSAS, *County of Shawnee, ss:*

William H. Mackey, jr., United States marshal for the district of Kansas, and A. T. Lucas, keeper of the county jail of Shawnee County, Kansas, being duly sworn, on their oaths state that they have read the foregoing return and that the allegations therein contained are true.

WILLIAM H. MACKEY, Jr.,
United States Marshal for the District of Kansas.
A. T. LUCAS,
Keeper of the County Jail of Shawnee County, Kansas.

Subscribed and sworn to before me this 23d day of November, 1904.
[SEAL.] GEO. F. SHARITT, *Clerk.*

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FILE COPY.

FILED
NOV 28 1904
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

IN THE MATTER OF THE APPLICATION OF ALBERT HEFF. NO. 14, ORIGINAL.

RETURN TO ORDER OF COURT DIRECTING ADMISSION OF PETITIONER TO BAIL.

Supreme Court of the United States.

No. 14, Original. October term, 1904.

EX PARTE. IN THE MATTER OF ALBERT HEFF, PETITIONER.

On consideration of the motion for leave to file a petition for a writ of habeas corpus herein and to admit the petitioner to bail pending the hearing.

It is now here ordered by the court that leave be, and the same is hereby, granted to file said petition and that petitioner be admitted to bail on filing a bond conditioned according to law in the penal sum of one thousand dollars, to be approved by the district judge for the district of Kansas.

November 7, 1904.

A true copy. Test:

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

(Indorsed:) Supreme Court of the United States. October term, 1904. Term No. 14, original. Order. Filed Nov. 7th, 1904.

In the Supreme Court of the United States.

No. 14, Original. October term, 1904.

EX PARTE. IN THE MATTER OF ALBERT HEFF, PETITIONER.

Pursuant to the foregoing order, the petitioner, Albert Heff, having on the 10th day of November, 1904, filed in the office of the clerk of the

United States district court for the district of Kansas, a bond conditioned according to law in the penal sum of one thousand dollars ($1,000), duly approved by the district judge for the district of Kansas, the said Albert Heff was released from custody according to the command of the said order.

WILLIAM H. MACKEY, Jr.,
United States Marshal for the District of Kansas.

A. T. LUCAS,
Keeper of the County Jail of Shawnee County, Kansas.

Subscribed and sworn to before me this 23d day of November, 1904.

[SEAL.]

GEO. F. SHARITT, *Clerk.*

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Supreme Court of the United States.

No. 14, Original.—October Term, 1904.

In the Matter of the Application of Albert Heff, for a Writ of Habeas Corpus.

[April 10, 1905.]

On October 15, 1904, petitioner was convicted in the District Court of the United States, District of Kansas, under an indictment charging that he did "unlawfully sell, give away and dispose of certain malt, spirituous and vinous liquors, at the town of Horton, in the county of Brown, in the State and District of Kansas, to John Butler, to wit, two quarts of beer, more or less, and he, the said John Butler, being then and there an Indian, a member of the Kickapoo tribe of Indians and a ward of the Government, under the charge of O. C. Edwards, an Indian superintendent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America." Upon such conviction he was sentenced to imprisonment in the county jail of Shawnee County, Kansas, for a period of four months, and to pay a fine in the sum of two hundred dollars and the costs of the prosecution. The Court of Appeals of the Eighth Circuit having decided the question involved (*Farrell* v. *United States*, 110 Fed. Rep. 942) adversely to his contention, he presented this application for a writ of *habeas corpus* directly to this court.

The act of Congress, January 30, 1897, (29 Stat. 506,) provides:

"That any person who shall sell, give way, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercise guardianship, . . . shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offence and not less than two hundred dollars for each offence thereafter."

The act of Congress, February 8, 1887, (24 Stat. 388,) is entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United

States and the Territories over the Indians, and for other purposes." Section 1 of that act provides:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulations or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows."

"SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided."

Section 5 reads:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charges or incumbrances whatsoever; *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Section 6 is as follows:

"That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born

within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Mr. Justice BREWER delivered the opinion of the Court.

The contention of petitioner is that the act of January 30, 1897, is unconstitutional as applied to the sales of liquor to an Indian who has received an allotment and patent of land under the provisions of the act of February 8, 1887, because it is provided in said act that each and every Indian to whom allotments have been made shall be subject to the laws, both civil and criminal, of the State in which they may reside, and further that John Butler, having, as is admitted, received an allotment of land in severalty and his patent therefor under the provisions of the act of Congress of February 8, 1887, is no longer a ward of the Government, but a citizen of the United States and of the State of Kansas, and subject to the laws, both civil and criminal, of said State.

The relation between the Government and the Indians and the rights and obligations consequent thereon have been the subject of frequent consideration by this court. Among the recent cases, in which are found references to many prior adjudications, may be mentioned *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, Id. 553, and *United States* v. *Rickert*, 188 U. S. 432. In a general way it may be said that the recognized relation between the Government and the Indians is that of a superior and an inferior, whereby the latter is placed under the care and control of the former. *Choctaw Nation* v. *United States*, 119 U. S. 1, 28. In the early dealings of the Government with the Indian tribes the latter were recognized as possessing some of the attributes of nations, with which the former made treaties, and the policy of the Government was, sometimes by treaties and sometimes by the use of force, to put a stop to the wanderings of these tribes and locate them on some definite territory or reservation, there establishing for them a communal or tribal life. While this policy was in force, and this location of wandering tribes was being accomplished, much of the legislation of Congress ran in the direction of the isolation of the Indians, preventing general intercourse between them and their white neighbors in order that they might not be defrauded or wronged through the superior cunning and skill of those neighbors. The practice of dealing with the Indian tribes as separate

nations was changed by a proviso inserted in the Indian appropriation act of March 3, 1871, (16 Stat. 566; carried into section 2079 R. S.,) which reads: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." From that time on the Indian tribes and the individual members thereof have been subjected to the direct legislation of Congress which, for some time thereafter, continued the policy of locating the tribes on separate reservations and perpetuating the communal or tribal life.

While during these years the exercise of certain powers by the Indian tribes was recognized, yet their subjection to the full control of the United States was often affirmed. In *Lone Wolf* v. *Hitchcock*, *supra*, p. 565, it was said: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government." And the conclusion thus reached was supported by the authority of several cases. It is true we ruled, when treaties between the Indian tribes and the United States were the subject of consideration, that "how the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." *Worcester* v. *Georgia*, 6 Pet. 515, 582. And we also said that the obligations which the United States were under to the Indians called for "such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection." *Choctaw Nation* v. *United States*, *supra*, p. 28. But none of the decisions affirming the protection of the Indians questioned the full power of the Government to legislate in respect to them.

Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end.

It may be well to notice some of the legislation of Congress having this end in view. Section 15 of the act of March 3, 1893, (27 Stat. 612, 645,) reads:

"The consent of the United States is hereby given to the allotment of lands in severalty, not exceeding one hundred and sixty acres, to any one individual within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles; and upon such allotments the individuals to whom the same may be allotted shall be deemed to be in all respects citizens of the United States. And the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated to pay for the survey of any such lands as may be allotted by any of said tribes of Indians to individual members of said tribes; and upon the allotment of the lands held by said tribes respectively, the reversionary interest of the United States therein shall be relinquished and shall cease."

Section 16 created what is known as the Dawes Commission, for extinguishing the national or tribal title to lands within the Indian Territory. Pursuant to its authority an agreement was made with the Choctaw and Chickasaw Nations for the allotment of their lands among the members, which agreement was ratified and approved by the act of Congress of June 28, 1898. (30 Stat. 495.) In that agreement it was stipulated (p. 513): "It is further agreed that the Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States." By the same act an agreement made with the Creek Indians, which contained a similar stipulation, was ratified and approved. In the last treaty with the Kickapoos, to which tribe John Butler, the person to whom the petitioner is charged to have sold the liquor, belonged, a treaty concluded June 28, 1862, (Revision of Indian Treaties, Art. 8, p. 449,) it was provided:

"ART. 3. At any time hereafter, when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provision of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the land severally held by them to be conveyed to them by patent in fee simple, with power of alienation; and may, at the same time, cause to be set apart and placed to their credit severally, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued, and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided*, That before making any such application to the President, they shall appear in open court, in the District Court of the United States for the District of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the

naturalization of aliens; and shall also make proof, to the satisfaction of said court, that they are sufficiently intelligent and prudent to control their affairs and interests; that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families."

A similar clause is found in the treaty of April 19, 1862, between the United States and the Pottawatomie Indians. (Revision of Indian Treaties, 683, 685.) It was not uncommon in the District Court of the United States for the District of Kansas, in the years following these treaties, to see Indians coming into the District Court and taking the oath of allegiance, as required by these provisions. We make these references to recent treaties, not with a view of determining the rights created thereby, but simply as illustrative of the proposition that the policy of the Government has changed, and that an effort is being made to relieve some of the Indians from their tutelage and endow them with the full rights of citizenship, thus terminating between them and the Government the relation of guardian and ward, and that the statute we are considering is not altogether novel in the history of Congressional legislation.

Now the act of 1887 was passed twenty-five years after the treaty of 1862 with the Kickapoos, and must be construed in the light of that treaty. By the treaty it was declared that at the instance of the President, and upon compliance with specified provisions, certain of the Indians should be considered as competent persons, should cease to be members of the tribe and become citizens of the United States. The act of 1887, in like manner, provides that at the instance of the President, a reservation may be surveyed and individual tracts allotted to the Indians, and that upon approval of the allotments by the Secretary of the Interior patents shall issue, subject to a condition against alienation and incumbrances during a period of twenty-five years, or longer, if the President deems it wise. Section 6 then declares that the "Indians to whom allotments shall have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law."

It is urged that this clause becomes operative only when the final patent provided for by section 5 is issued, but there are many reasons why such contention is unsound. In the first place, it is hardly to be supposed that Congress would legislate twenty-five years in advance in respect to the general status of these Indians. If they were to continue in the same relation to the Government that they hitherto occupied, it would seem as though Congress would have said nothing and waited until near the expiration of twenty-five years before determining what should be such status. Second, the language of the first sentence of section 6 forbids the construction con-

tended for. It is "that upon the completion of said allotments and the patenting of the lands to said allottees." Now the allotting and the patenting are joined together as though occurring at or near the same time. Further, when the first patent, is issued the recipient ceases to be an allottee and becomes a patentee. Again, the second patent does not always go to the holder of the first patent because, as provided by section 5, it may go to the first patentee or his heirs. And finally, the last sentence indicates that the whole section deals with present conditions and present rights. It reads: "And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act . . . is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, . . . without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." This confers citizenship upon the allottee and not upon the patentee, while at the same time securing to him his right to tribal or other property. So far as his political status is concerned the allottee is declared to be a citizen—not that he will be a citizen after twenty-five years have passed and a second patent shall have been issued. That citizenship is limited to the allottees born within the territorial limits of the United States was obviously intended to exclude from that privilege such allottees, if any there should be, who had recently come into this country from the Dominion of Canada or elsewhere.

This question has been presented to several State and some Federal courts, and the ruling universally has been to the same effect. *State ex rel.* v. *Denoyer*, 6 N. Dak. 586; *State ex rel.* v. *Norris*, 37 Neb. 299; *Wa-La-Note-Tke-Tynin* v. *Carter*, 6 Idaho, 85; *In re Now-Ge-Zhuck*, 76 Pac. Rep; 877. *United States* v. *Rickert*, 106 Fed. Rep. 5; *Farrell* v. *United States*, 110 Fed. Rep. 942, 947. In the first of these cases this declaration is made: "Such Indians and persons of Indian descent, so residing upon lands allotted to them in severalty, and upon which the preliminary patents have been issued, are citizens of the United States, and qualified electors of this State." See also *Boyd* v. *Thayer*, 143 U. S. 135, 162, in which it is said: "The act of Congress approved February 8, 1887, (24 Stat. 388,) was much broader, and by its terms made every Indian situated as therein referred to, a citizen of the United States."

In reference to this matter the learned Solicitor General makes these observations:

"Were it not for the fact that every court that has considered this language at all has assumed it to mean that an Indian becomes entitled to the benefit of and subject to the laws of the State in which he resides upon the receipt of his first patent, the natural inference would be that Congress intended those consequences to attach only when the allotments referred to had been fully completed and final patent issued. But in spite of the

array of cases upon this subject, it will be found, upon examination, that in none of them was the provision referred to carefully analyzed and discussed, and that from first to last it has been merely a matter of assumption.

"Upon the subject of citizenship, section 6 provides that 'every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act or under any law or treaty, . . . is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens.'

"It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian becomes subject to the laws of the State or Territory in which he resides. As a matter of constitutional law, an Indian appears to be entitled to the benefit of and to be subject to the laws of the State in which he resides the moment he becomes a citizen of the United States. By virtue of the Fourteenth Amendment a citizen of the United States becomes, by residence therein, a citizen of the State, and entitled to all the rights, privileges, and immunities of other citizens of the State and to the equal protection of its laws." (*The Slaughter House Cases*, 16 Wall. 36.)

We do not doubt that the construction placed by these several courts upon this section is correct, and that John Butler, at the time the defendant sold him the liquor, was a citizen of the United States and of the State of Kansas, having the benefit of and being subject to the laws, both civil and criminal, of that State. Under these circumstances could the conviction of the petitioner in the Federal court of a violation of the act of Congress of January 30, 1897, be sustained? In this Republic there is a dual system of government, national and State. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other. The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and powers vested in the general government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of State jurisdiction. It is true the national government exacts licenses as a condition of the sale of intoxicating liquors, but that is solely for the purposes of revenue and is no attempted exercise of the police power. A license from the United States does not give the licensee authority to sell liquor in a State whose laws forbid its sale, and neither does a license from a State to sell liquor enable the licensee to sell without paying the tax and obtaining the license required by the Federal statute. *License Cases*, 5 How. 504; *McGuire* v. *The Commonwealth*, 3 Wall. 387; *License Tax Cases*, 5 Wall. 462. Now the act of 1897 is not a revenue statute, but plainly a police regulation. It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State would be an in-

vasion of the State's jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the nation and not divided between the two.

In *The Kansas Indians*, 5 Wall. 737, the question was whether lands of Shawnee Indians held in severalty were subject to State taxation, and it was held that they were not, although in the last treaty with the Shawnees, the one authorizing the allotments, there was no express stipulation for exemption from taxation. The court said (p. 755):

"If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the Government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity, there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound to all the duties of citizens,' they enjoy the privilege of total immunity from State taxation."

If it be true that there can be no divided authority over the property of the Indian, *a fortiori* must it be true as to his political status and rights.

Subjection to both State and National law in the same matter might often be impossible. The power to punish a sale to an Indian implies an equal power to punish a sale by an Indian. If by national law a sale to or by an Indian was punished solely by imprisonment and by State law solely by fine, how could both laws be enforced in respect to the same sale? The question is not whether a particular right may be enforced in either a court of the State or one of the nation, but whether two sovereignties can create independent duties and compel obedience. In *United States* v. *Dewitt*, 9 Wall. 41, the question was whether the twenty-ninth section of the internal revenue act of March 2, 1867, (14 Stat. 484,) which established a police regulation in respect to the mixing for sale or the selling of naphtha and illuminating oils was enforcible within the limits of a State, and it was held that it was not, the court saying (p. 45):

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation."

In re Now-Ge-Zhuck, *supra*, decided by the Supreme Court of Kansas, referred to an allottee under the act of February 8, 1887, and in respect to the power of the State to enforce its laws over such allottee that court said:

"An Indian upon whom has been conferred citizenship, and who enjoys the protection of the laws of the State, should be punished for a transgression of them. This we are to presume Congress contemplated. It being shown by the agreed facts that the petitioner was an allottee to whom a patent had been issued, and further shown that the allotments had been made and completed as provided by the act of February 8, 1887, the laws of the State were operative, and the State had jurisdiction to arrest and punish petitioner for the offence by him committed."

It is true the same act may often be a violation of both the State and Federal law, but it is only when those laws occupy different planes. Thus, a sale of liquor may be a violation of both the State and Federal law, in that it was made by one who had not paid the revenue tax and received from the United States a license to sell, and also had not complied with the State law in reference to the matter of State license. But in that case the two laws occupy different planes—one that of revenue and the other that of police regulation. There is no suggestion in the present case of a violation of the internal revenue law of the nation, but the conviction is sought to be upheld under the act of 1897, a mere statute of police regulation.

But it is contended that although the United States may not punish under the police power the sale of liquor within a State by one citizen to another it has power to punish such sale if the purchaser is an Indian. And the power to do this is traced to that clause of section 8, art. 1, of the Constitution, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress having power to regulate commerce between the white men and the Indians continues to retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the State and shall be a citizen of the United States, and therefore a citizen of the State. But the logic of this argument implies that the United States can never release itself from the obligations of guardianship; that so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national and therefore State citizenship, the benefits and burdens of the laws of the State, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the State, and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian blood in his veins, he is to be forever one of a special class over whom the general government may in its discretion assume the rights of guardianship which it has once abandoned, and this whether the State or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound.

But it is said that the Government has provided that the Indians' title shall not be alienated or encumbered for twenty-five years, and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property, but these are mere property rights and do not affect the civil or political status of the allottees. In *United States* v. *Rickert*, 188 U. S. 432, we sustained the right of the Government to protect the lands thus allotted and patented from any encumbrance of State taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants. This it may do by appropriate proceedings in either a national or a State court. But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title. Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands; and the proper tribunal may at the instance of the rightful party enforce all restraints upon alienation.

But it is unnecessary to pursue this discussion further. We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property.

The District Court of Kansas did not have jurisdiction of the offence charged, and therefore the petitioner is entitled to his discharge from imprisonment.

Mr. Justice HARLAN dissented.

True copy.

Test:

Clerk Supreme Court, U. S.